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In The
Supreme Court of the United States

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF DELAWARE,

Defendant.

MOTION TO REOPEN AND FOR A SUPPLEMENTAL DECREE, PETITION, BRIEF AND APPENDIX IN SUPPORT OF MOTION

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No. 11, Original

In The

Supreme Court of the United States

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF DELAWARE,

Defendant.

MOTION TO REOPEN AND FOR A SUPPLEMENTAL DECREE

Comes now the State of New Jersey, by and through the Attorney General of the State of New Jersey, Peter C. Harvey, and respectfully asks the Court to reopen this matter and issue a supplemental decree in accordance with the Petition submitted herewith.

PETER C. HARVEY
Attorney General

July 28, 2005
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In The

Supreme Court of the United States

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF DELAWARE,

Defendant.

PETITION FOR SUPPLEMENTAL DECREE

The State of New Jersey, by and through its Attorney General, Peter C. Harvey, petitions this Court for a Supplemental Decree, and, in support of this petition, states as follows:

Jurisdiction of This Court

1. Pursuant to paragraph 5 of the 1935 Decree, this Court "retains jurisdiction of this cause for the purpose of any order or direction, or modification of this decree, or any supplemental decree, which it may at any time deem to be proper in order to carry into effect any of the provisions of this decree. . . ." 295 U.S. 694, 698 (1935).

2. Original jurisdiction is also proper here pursuant to Article III, Section 2, Clause 2, of the Constitution of the United States and 28 U.S.C. § 1251(a).

3. The filing of this Petition has been authorized by the Acting Governor and by the Attorney General of New Jersey.

Introduction

4. This is a petition for a Supplemental Decree declaring that Article VII of the Compact of 1905 between the State of New Jersey and the State of Delaware grants New Jersey riparian jurisdiction to regulate the construction of improvements appurtenant to the New Jersey shore of the Delaware River within the Twelve-Mile Circle, free of regulation by Delaware. The State of New Jersey also seeks to enjoin the State of Delaware from requiring permits for the construction of any improvement appurtenant to the New Jersey shore of the Delaware River within the Twelve-Mile Circle, and from enforcing any conditions attached to such permits.

Background

5. Prior to the 1934 decision in this case, the States of New Jersey and Delaware had disputed the location of their common boundary "almost from the beginning of statehood." *New Jersey v. Delaware*, 291 U.S. 361, 376 (1934). New Jersey consistently claimed that its title extended to the middle of the main shipping channel along the entire length of the Delaware River and Bay opposite the State of Delaware. In the lower River and Bay, below the twelve-mile radius from New Castle, Delaware (the "Twelve-Mile Circle"), Delaware claimed that its title extended to the geographical center of the River. Within the Twelve-Mile Circle, however, Delaware claimed that its title

extended to the low-water mark on the New Jersey shoreline. Delaware traced that title to a deed of feoffment and lease on August 24, 1682 from the Duke of York to William Penn. *Id.* at 364.

6. The validity of Penn's title was challenged not only during colonial times, but by the State of New Jersey following Independence. *Id.* at 369-70.

7. In 1877, New Jersey was granted leave by this Court to file a Bill of Complaint against Delaware to determine the boundary between the States in the Delaware River. (No. 1, Orig.) The suit was initiated after Delaware attempted to enforce its fishing laws against New Jersey fishermen. On March 26, 1877, following oral argument, the Court entered a preliminary injunction restraining Delaware "from imposing any tax, assessment or imposition whatsoever, by way of license fee or otherwise, upon any citizen or resident of the State of New Jersey . . . for right or authority to fish in the river Delaware, as they have heretofore been accustomed . . . until this court shall make other order to the contrary." (Record, No. 1, Orig., at 53-54.) The Court's order recited that "for a long period of time, to wit, more than seventy years last past, the State of New Jersey has claimed and exercised jurisdiction over the easterly portion of the river Delaware to the middle of the same . . . ." (*Id.* at 53.)

8. With the preliminary injunction in place, the case "slumbered for many years." 291 U.S. at 377. In 1903, however, in order to settle the then-pending dispute, commissioners appointed by both States negotiated the text of what later became the Compact of 1905. New Jersey ratified the Compact on April 8, 1903, 1903 N.J. Laws ch. 243, p.515 (Record, No. 11, Orig., Pl. Ex. 161 at 30), but the Delaware legislature failed to approve it. In February 1905,

both States re-appointed commissioners. 23 Del. Laws ch. 216 (1905) (Record, No. 11, Orig., Pl. Ex. 162 at 13); 1905 N.J. Laws ch. 42, p.67 (Record, No. 11, Orig., Pl. Ex. 161 at 32). They met in Philadelphia on February 18, 1905 and quickly agreed to the same provisions as in 1903 (*Id.*, Pl. Ex. 161 at 33-34). Delaware approved the Compact on March 20, 1905. 23 Del. Laws ch. 5 (1905) (Record, No. 11, Orig., Pl. Ex. 162 at 14-15). New Jersey did so the next day. 1905 N.J. Laws ch. 42, p.67 (Record, No. 11, Orig., Pl. Ex. 161 at 35). Congress ratified the Compact on January 24, 1907. Act of Jan. 24, 1907, ch. 394, 34 Stat. 858 (1907).

9. Of particular importance to the present controversy is Article VII of the Compact of 1905, which provides:

> Article VII. Each State may, on its own side of the river, continue to exercise riparian jurisdiction of every kind and nature, and to make grants, leases, and conveyances of riparian lands and rights under the laws of the respective States.

10. Following ratification of the Compact by Congress, New Jersey's suit was dismissed without prejudice. 205 U.S. 550 (1907).

11. Although the 1905 Compact resolved numerous jurisdictional issues, it did not settle the boundary line. In 1925, a dispute arose over the ownership of an oyster bed in the Delaware Bay south of the Twelve-Mile Circle. The States were again unable to resolve the dispute, which had been left open by Article VI of the Compact of 1905. In 1927, this Court again granted New Jersey leave to file suit to determine the line along the entire boundary, both within and below the Twelve-Mile Circle ("*New Jersey v.*

Delaware II"). (No. 11, Orig.) The Court appointed a Special Master, who submitted his report on October 9, 1933. The Report of the Special Master is reported at 55 S. Ct. 934 (1933). Both States filed exceptions.

12. On February 5, 1934, the Court issued an opinion confirming the Special Master's report. 291 U.S. at 385. As to that portion of the River within the Twelve-Mile Circle, the Court set the boundary at the mean low-water line on the New Jersey shore, "subject to the Compact of 1905." *Id.* As to the boundary in the lower River and Bay, the Court set the line in the middle of the main shipping channel. *Id.*

13. New Jersey does not dispute the location of its boundary with the State of Delaware. However, that boundary is subject to the Compact of 1905.

14. Paragraph 5 of the 1935 Decree provided that this Court "retains jurisdiction of this cause for the purpose of any order or direction, or modification of this decree, or any supplemental decree, which it may at any time deem to be proper in order to carry into effect any of the provisions of this decree." 295 U.S. at 698. Paragraph 6 provided that "the State of Delaware, its officers, agents, and representatives, its citizens and all other persons, are perpetually enjoined from disputing the sovereignty, jurisdiction, and dominion of the State of New Jersey over the territory adjudged to the State of New Jersey by this decree. . . " and the State of New Jersey was similarly enjoined. *Id.* at 698-99. Paragraph 7 provided that the Decree was "without prejudice to the rights of either state, or the rights of those claiming under either of said states, by virtue of the compact of 1905 between said states . . . ." *Id.* at 699.

New Jersey's Riparian Jurisdiction Within the Twelve-Mile Circle

15. The State of New Jersey, since the 1800's, has exercised riparian jurisdiction and regulated its riparian lands on its own side of the Delaware River, including within the Twelve-Mile Circle.

16. Between 1854 and 1871, the New Jersey Legislature enacted five separate grants within the Twelve-Mile Circle for the construction of various piers and wharves extending from the New Jersey shore beyond the low-water mark into the Delaware River. 1854 N.J. Laws ch. 143, p.375 (Record, No. 11, Orig., Pl. Ex. 41); 1855 N.J. Laws ch. 109, p.274 (Record, No. 11, Orig., Pl. Ex. 42); 1870 N.J. Laws ch. 131, p.346 (Record, No. 11, Orig., Pl. Ex. 48); 1870 N.J. Laws ch. 344, p. 726 (Record, No. 11, Orig., Pl. Ex. 44); 1871 N.J. Laws ch. 307, p.758 (Record, No. 11, Orig., Pl. Ex. 43).

17. Beginning in 1883, also within the Twelve-Mile Circle, the New Jersey Board of Riparian Commissioners, and later its successor agencies, issued numerous riparian grants to private owners for submerged lands and structures extending below the low-water mark into the Delaware River. (*See* Report of the Special Master at 52, citing Pl. Exs. 57-92, 94-97).

18. On at least eight occasions from 1854 to 1905, the State of New Jersey approved riparian grants extending below the mean low-water line in the Twelve-Mile Circle. These grants also authorized the building of riparian structures on lands extending beyond the low-water line. From 1905 to the present, on at least thirty-three occasions,

New Jersey similarly issued riparian grants extending below the mean low-water line within the Twelve-Mile Circle.

19. In its briefs and arguments in *New Jersey v. Delaware II*, Delaware repeatedly acknowledged both the right of New Jersey citizens to wharf out to navigable water within the Twelve-Mile Circle, and the exclusive right of New Jersey to regulate the exercise of those riparian rights. For instance, in its Reply Brief to the Special Master, Delaware stated: "Article VII of the Compact is obviously merely a recognition of the rights of the riparian owners of New Jersey and a cession to the State of New Jersey by the State of Delaware of jurisdiction to regulate those rights." (Reply Brief of the Defendant Before the Special Master at 9 (Bound Volume 15).) Delaware further conceded New Jersey's exclusive regulatory authority over such rights in its oral argument before the Special Master:

> We say moreover that the Compact of 1905 expressly acknowledged the rights of the citizens of New Jersey, at least, by implication to wharf out, and in my view the Compact of 1905 ceded to the State of New Jersey all the right to control the erection of those wharves and to say who shall erect them, and it was a very sensible thing to do. (Argument of Clarence A. Southerland, Esq. for Delaware, Oral Argument Before the Special Master, September 12, 1932, at 91 (Bound Volume 15).)

Mr. Southerland, Delaware's counsel, served as the Attorney General of Delaware from 1925 to 1929, and as the first Chief Justice of the Supreme Court of Delaware from 1951 to 1963.

20. On or about December 2, 1957, S. Samuel Arsht, Esq., counsel to the Delaware State Highway Department, advised the Department that it was his opinion that, pursuant to the 1905 Compact and this Court's decision in No. 11, Orig., the State of Delaware did not have jurisdiction over the construction of improvements appurtenant to the New Jersey side of the River within the Twelve-Mile Circle. Acting on that advice, the Delaware State Highway Department adopted a resolution on December 11, 1957, directing its Chief Engineer to notify the U.S. Army Corps of Engineers that "while the Department has no jurisdiction over the area mentioned, the Department wishes to be notified of all permits requested and granted." The Delaware State Highway Department notified the U.S. Army Corps of Engineers on or about December 13, 1957, that "[a]t the December 11th meeting of the Delaware State Highway Department it was determined that the Corps of Engineers be requested to continue to supply the Delaware State Highway Department with information regarding proposed work in, on, or under the Delaware River on the New Jersey side provided, however, that no permit of the Corps of Engineers be held up or otherwise delayed by failure of the Delaware State Highway Department to act upon it." The letter advised, by contrast, that "[i]f any work is contemplated or requested on the Delaware side, then, of course, no permits should be issued without approval of the Delaware State Highway Department."

The Present Controversy

21. Delaware currently has two State permitting requirements applicable to waterway construction activities in Delaware waters. Both permit programs are administered

by the Delaware Department of Natural Resources and Environmental Control ("DNREC").

22. In 1971, Delaware adopted the Delaware Coastal Zone Act, 58 Del. Laws ch. 175 (1971), codified at Del. Code Ann. tit. 7, §§ 7001-7013 (2005) (the "DCZA"). The DCZA declares that it is Delaware's policy "to prohibit entirely the construction of new heavy industry in its coastal areas, which industry is determined to be incompatible with the protection of that natural environment in those areas." *Id.* § 7001. The DCZA provides that certain uses are "absolutely prohibited" in the Delaware coastal zone. *Id.* § 7003. It forbids "[h]eavy industry uses of any kind" as well as any "offshore gas, liquid or solid bulk product transfer facilities" that were "not in operation on June 28, 1971." *Id.* The Port of Wilmington is exempted from the prohibition on "bulk product transfer facilities." *Id.* § 7002(f). Industrial development other than that of heavy industry requires a permit issued by the Secretary of DNREC. *Id.* § 7004. Persons who violate the DCZA are subject to a fine of up to $50,000 per day for each day of the violation. *Id.* § 7011.

23. On December 13, 1991, DNREC issued a DCZA permit to Keystone Cogeneration Systems, Inc., now known as Logan Generating Company, L.P. ("Logan"), to construct a 1550-foot pier and water intake structure in the Delaware River to service a 225-MW coal fired power plant in New Jersey. Since 1991, to New Jersey's knowledge the only other applicant for a DCZA permit for the construction of an improvement appurtenant to the New Jersey shore has been Crown Landing, LLC, *infra*.

24. In 1986, Delaware enacted the Subaqueous Lands Act, 65 Del. Laws ch. 508 (1986), codified at Del. Code Ann. tit. 7, §§ 7201-7217 (2005) (the "DSLA"). The DSLA provides that "[n]o person shall deposit material upon

or remove or extract materials from, or construct, modify, repair or reconstruct, or occupy any structure or facility upon submerged lands or tidelands without first having obtained a permit, lease or letter of approval from the Department." *Id.* § 7205(a). The DSLA also provides "[t]here shall be no appeal of a decision by the Secretary to deny a permit on any matter involving state-owned subaqueous lands." *Id.* § 7210. Violations of the DSLA are punishable by civil fines and criminal penalties. *Id.* § 7214.

25. To date, the DSLA has been applied to only a limited number of projects on the New Jersey side of the River. DNREC issued a DSLA permit to Logan on September 30, 1991 for the pier and water intake structure mentioned above. In March 2005, DNREC approved a DSLA permit for Fenwick Commons, LLC, for the renovation of a marina and piers appurtenant to "The Riverwalk at Penns Grove," a 12-acre redevelopment project in the Borough of Penns Grove, Salem County, New Jersey, discussed, *infra*.

26. On September 16, 2004, Crown Landing, LLC submitted an application to the Federal Energy Regulatory Commission ("FERC") to construct and operate a liquefied natural gas import terminal and re-gasification facility in Logan Township, Gloucester County, New Jersey. This project requires a pier appurtenant to the New Jersey shoreline that would extend approximately 2,000 feet beyond the mean low water line into the Delaware River on the New Jersey side of the main channel within the Twelve-Mile Circle.

27. The New Jersey Board of Public Utilities has advised FERC that the Crown Landing project should "play an important part in ensuring a competitive and reliable

supply of natural gas to New Jersey's and the region's energy customers."

28. On October 29, 2004, DNREC declined to issue a DSLA permit for the pier until Crown Landing first obtained a DCZA permit.

29. Accordingly, on December 7, 2004, Crown Landing submitted to the Secretary of DNREC a request for a status decision that the Crown Landing pier was permitted by the DCZA. On February 3, 2005, the Secretary concluded that the Crown Landing project represented both an "offshore bulk transfer facility" as well as a "heavy industry use" that were specifically prohibited by the DCZA. The Secretary also concluded -- with reference to structures located entirely within the State of New Jersey -- that "the on-shore storage tanks essential to the operation of the facility are prohibited structures."

30. Crown Landing appealed the Secretary's decision to the Delaware State Coastal Zone Industrial Control Board, pursuant to Del. Code Ann. tit. 7, § 7007 (2005). That Board affirmed the Secretary's determination on March 31, 2005. That determination has now become final.

31. Delaware's imposition of a permit requirement for the Crown Landing project violates New Jersey's rights under Article VII of the Compact of 1905 because it interferes with New Jersey's exclusive State riparian jurisdiction over riparian improvements appurtenant to the New Jersey shore of the Delaware River.

32. On July 13, 2004, Fenwick Commons, LLC, applied to DNREC for a Subaqueous Lands Lease and Water Quality Certification to refurbish a 750-foot long pier and

other structures, and to fill 1,882 square feet of tidal lands at Penns Grove, Salem County, New Jersey. Fenwick Commons notified Delaware on May 6, 2005, that "financing considerations" compelled it to obtain the Delaware permit in order to proceed with the project. But Fenwick Commons nonetheless stated: "the issue as to ownership of lands is in dispute as to the Riparian Grants from the State of New Jersey . . . Our position is that we will leave the issue of riparian rights and Delaware ownership to be resolved at a different time and in a different for[u]m." On May 10, 2005, DNREC approved a Subaqueous Lands Lease to Fenwick Commons, L.L.C. The lease has a term of twenty years and is renewable.

33. The Fenwick Commons pier occupies lands that were the subject of: an act of the State of New Jersey 150 years ago incorporating the Pennsgrove Pier Company (1855 N.J. Laws ch. 109, p. 274); a New Jersey tidelands grant dated March 21, 1916 (recorded in Salem County, New Jersey, in Deed Book 130, page 383); and a New Jersey tidelands grant to French's Hotel Company dated October 17, 1921 (recorded in Salem County, New Jersey, in Deed Book 166, page 330). The taxability of this granted area by the municipality of Penns Grove in New Jersey was the subject of the New Jersey Superior Court Chancery Division's decision in *Main Associates, Inc. v. B & R Enterprises, Inc.*, 74 N.J. Super. 483, 181 A.2d 541 (Ch. Div. 1962). The pier is taxed by the Borough of Penns Grove, and depicted on its tax maps as Block 57, Lot 6. In *State of New Jersey v. Federanko*, 26 N.J. 119, 139 A.2d 30 (1958), the Supreme Court of New Jersey upheld the authority of New Jersey to exercise criminal jurisdiction over gambling offenses committed on this pier. In sum, New Jersey has asserted jurisdiction over this specific structure by legislative action in 1855, by executive actions in 1916 and 1921, and by judicial actions in 1958 and 1962.

34. Delaware's requirement that Fenwick Commons obtain a Subaqueous Lands Lease violates the terms of the Compact of 1905, which protected New Jersey's rights to exercise riparian jurisdiction of every kind and nature on its side of the Delaware River, and to make grants, leases, and conveyances of riparian lands. Further, this Lease purports to assess a fee for the filling of lands on the New Jersey side of the Delaware River. New Jersey's prior approval for the filling of any riparian lands has been required since 1891. N.J. Stat. Ann. § 12:3-4 (1979). New Jersey's review of applications to allow such filling has been a part of its exercise of riparian jurisdiction since the Wharf Act of 1851, and the 1891 prohibition on filling of riparian lands without its approval. Delaware's 2005 lease interferes with New Jersey's riparian jurisdiction and its riparian grants to Fenwick Commons, in violation of Article VII of the Compact of 1905.

35. Because of its irregular shape, New Jersey's shoreline within the Twelve-Mile Circle along the Delaware River is approximately 29 miles long. Six municipalities and two counties of New Jersey have boundaries within this area: Logan Township, Gloucester County and Oldmans Township, Penns Grove Township, Carneys Point Township, Pennsville Township and Elsinboro Township, all in Salem County.

36. Delaware's exercise of riparian jurisdiction on the New Jersey side of the River within the Twelve-Mile Circle interferes with New Jersey's sovereign right under the Compact of 1905 to regulate the riparian rights of its own citizens in this area, and has effectively blocked the Crown Landing project. Delaware's continued interference with the exercise of New Jersey's riparian jurisdiction may

discourage economic development along this part of New Jersey's shoreline.

37. The State of New Jersey owns riparian shoreline within the Twelve-Mile Circle. Thus, Delaware's actions also threaten the construction of projects by the State of New Jersey itself within the Twelve-Mile Circle.

38. Income from New Jersey's riparian lands program has been dedicated to New Jersey's Fund for the Support of Free Public Schools since at least 1898. N.J. Stat. Ann. § 18A:56-5 and -6 (1999). Over the long term, a negative effect on development along the New Jersey shoreline within the Twelve-Mile Circle will diminish the income received by the State of New Jersey for conveyances and leases of riparian lands and will reduce the income received by the State's School Fund.

39. Delaware's regulation of riparian improvements on the New Jersey side of the River within the Twelve-Mile Circle conflicts with Article VII of the Compact of 1905 and interferes with the rights reserved to New Jersey by paragraph 7 of the 1935 Decree. Even in the absence of the Compact, Delaware's exercise of authority under the DCZA to prohibit entire categories of riparian activity that New Jersey may choose to allow would violate New Jersey's rights under federal common law.

Attempts to Resolve This Matter

40. The Federal Coastal Zone Management Act ("FCZMA") was enacted in 1972 to encourage cooperation between federal, state and local coastal zone management activities, but does not modify or supersede any interstate compact. 16 U.S.C. §1452(4),(5); 16 U.S.C. §1456(e)(1). After enactment of the FCZMA, New Jersey prepared its

own coastal zone management plan in 1978 and 1980, in which it recognized potential conflicts that could arise with Delaware over regulation of projects within the Twelve-Mile Circle and the need for coordination between the States for such projects. For a period of time in the early 1990s, New Jersey and Delaware sought a means for resolving these potential conflicts through a formal agreement. However, New Jersey abandoned its efforts to reach a formal agreement in 1994, based on concerns that such an agreement would create an overly cumbersome approval process and would give Delaware effective veto power over projects on the New Jersey side of the Delaware River.

41. Recently, New Jersey state officials have sought without success to persuade Delaware that its exercise of riparian jurisdiction on the New Jersey side of the River violates Article VII of the Compact of 1905. On April 11, 2005, following informal efforts to reach a settlement, Paul T. Fader, the Chief Counsel to the Acting Governor of New Jersey, Richard J. Codey, formally advised Delaware that, under the Compact of 1905, "Delaware does not have jurisdiction over the construction of this project or any project appurtenant to New Jersey's shoreline."

42. Delaware responded by letter dated May 9, 2005, from Joseph C. Schoell, Legal Counsel to the Governor of Delaware, Ruth Ann Minner. Delaware rejected New Jersey's contentions and claimed that the Compact of 1905 limited New Jersey's riparian jurisdiction solely to New Jersey's territory above the low water mark on the New Jersey shore.

43. Other efforts to resolve the dispute have proven futile. For instance, on May 2, 2005, the New Jersey State Assembly unanimously adopted a resolution urging the Governor and General Assembly of Delaware to amend the

DCZA to make clear that it "does not apply to facilities over which New Jersey retains riparian jurisdiction pursuant to Article VII of the Compact." A. Res. 260, 211th Leg. (N.J. 2005). The identical resolution is currently pending in the New Jersey Senate. S. Res. 100, 211th Leg. (N.J. 2005).

44. On June 27, 2005, thirty-one New Jersey legislators introduced a bill requiring that New Jersey state pension funds be withdrawn from Delaware banks unless Delaware conforms its permitting laws to respect New Jersey's rights under the 1905 Compact. State of New Jersey Assembly Bill No. A4287.

45. Delaware has refused to change its position in response to these initiatives. Instead, on June 29, 2005, two Delaware legislators responded by introducing legislation authorizing the Governor to call on the National Guard of Delaware to remove any "encroachments" upon Delaware's boundary. State of Delaware House of Representatives Bill No. 296. Thus, notwithstanding its statements before this Court in the 1930s, Delaware has refused to acknowledge that the Compact of 1905 grants New Jersey exclusive riparian jurisdiction on the New Jersey side of the Delaware River within the Twelve-Mile Circle.

Prayer for Relief

Wherefore, the State of New Jersey prays that the Court enter a Supplemental Decree:

1. Declaring that Article VII of the Compact of 1905 between the State of New Jersey and the State of Delaware grants New Jersey riparian jurisdiction to regulate the construction of improvements appurtenant to the New

Jersey shore of the Delaware River within the Twelve-Mile Circle, free of regulation by Delaware;

2. Enjoining the State of Delaware from requiring permits for the construction of any improvement appurtenant to the New Jersey shore of the Delaware River within the Twelve-Mile Circle, and further enjoining Delaware from enforcing any conditions attached to any such permits; and

3. Awarding the State of New Jersey such other relief as the Court deems just and proper.

Respectfully submitted,

Peter C. Harvey
Attorney General of New Jersey

July 28, 2005

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BRIEF IN SUPPORT OF MOTION TO REOPEN AND FOR A SUPPLEMENTAL DECREE

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QUESTION PRESENTED FOR REVIEW

The Compact of 1905 between the States of New Jersey and Delaware established the States' respective jurisdiction over the Delaware River, but not the boundary line between them. With respect to jurisdiction over riparian rights, Article VII of the Compact provided that:

> Each State may, on its own side of the river, continue to exercise riparian jurisdiction of every kind and nature, and to make grants, leases, and conveyances of riparian lands and rights under the laws of the respective States.

Nearly three decades later, this Court settled the boundary line, which had been previously disputed by Delaware and New Jersey "almost from the beginning of statehood." *New Jersey v. Delaware*, 291 U.S. 361, 376 (1934). As to the boundary within the twelve-mile circle of New Castle, Delaware (the "Twelve-Mile Circle"), the Court established the line at the mean low-water mark on the New Jersey shore, "subject to the Compact of 1905." *Id.* at 385. Paragraph 7 of the 1935 Decree provided that it was "without prejudice to the rights of either state, or the rights of those claiming under either of said states, by virtue of the compact of 1905 between said states . . . ." 295 U.S. 694, 699 (1935).

The question presented here is whether the Compact of 1905 grants New Jersey exclusive State riparian jurisdiction over improvements appurtenant to the New Jersey side of the Delaware River within the Twelve-Mile Circle, free from regulation by Delaware.

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No. 11, Original

In The
Supreme Court of the United States

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF DELAWARE,

Defendant.

BRIEF IN SUPPORT OF MOTION TO REOPEN AND FOR A SUPPLEMENTAL DECREE

INTRODUCTION

The State of New Jersey submits this brief in support of its motion to reopen No. 11, Original, in order to obtain a supplemental decree enforcing New Jersey's sovereign rights under the Compact of 1905 with the State of Delaware. New Jersey is not disputing the location of the boundary between the States, which this Court decided in 1934. That boundary decision, however, was made expressly subject to the Compact of 1905. Accordingly, New Jersey seeks a declaration that the Compact of 1905 grants New Jersey exclusive riparian jurisdiction over waterfront improvements extending from the New Jersey shoreline into the Delaware River within an area known as the Twelve-Mile Circle.[1] New Jersey further seeks to restrain Delaware from asserting

[1] The Twelve-Mile Circle refers to an area encompassed by a circle centered at New Castle, Delaware, that was the subject of a conveyance from the Duke of York to William Penn in 1682. *See New Jersey v. Delaware*, 291 U.S. 361, 364 (1934).

riparian jurisdiction over such improvements on New Jersey's side of the River.

JURISDICTION

The jurisdiction of this Court is invoked under Article III, Section 2, Clause 2, of the Constitution of the United States, 28 U.S.C. § 1251(a), and paragraph 5 of the 1935 Decree in No. 11, Original, 295 U.S. 694, 698 (1935).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Art. III, § 2, cl. 2:

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction.

28 U.S.C. § 1251(a), Original Jurisdiction:

> The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.

Article VII of the Compact of 1905:

> Each State may, on its own side of the river, continue to exercise riparian jurisdiction of every kind and nature, and to make grants, leases, and conveyances of riparian lands and rights under the laws of the respective States. Act of Jan. 24, 1907, ch. 394, 34 Stat. 858 (1907). (App. 5a.)

SUMMARY OF ARGUMENT

Until this Court settled the boundary line in 1934, New Jersey and Delaware had disputed the location of the boundary almost since their formation as independent States. *New Jersey v. Delaware*, 291 U.S. 361, 376 (1934). In 1905, while the first boundary suit was pending (No. 1, Orig.), the States entered into a Compact that settled their jurisdictional disputes while leaving the boundary line unresolved. This Court ultimately settled the line in 1934, *id.* at 385, and entered its decree in 1935, 295 U.S. at 694 ("Decree") (App. 8a). Within the Twelve-Mile Circle, the Court established the boundary at the mean low-water line on the New Jersey side, "subject to the Compact of 1905." 291 U.S. at 385.[2] The Decree was made "without prejudice to the rights of either state, or the rights of those claiming under either of said states, by virtue of the compact of 1905 between said states . . . ." 295 U.S. at 699.

Article VII of the 1905 Compact clearly protects New Jersey's right to regulate waterfront improvements extending from the New Jersey shoreline into the Delaware River within the Twelve-Mile Circle. In fact, in the proceedings before the Court and the Special Master, Delaware conceded that the 1905 Compact expressly reserved New Jersey's exclusive right to exercise riparian jurisdiction on its side of the Delaware River. Consistent with this understanding of the 1905 Compact, after the boundary line was settled, New Jersey continued to exercise riparian jurisdiction on its side of the Delaware River east of the main channel.

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[2] The "low-water mark" of a river is defined as "the point to which the water recedes at its lowest stage." Black's Law Dictionary 1623 (8th ed. 2004).

In March 2005, for the first time, Delaware invoked its laws to block the construction of a pier on the New Jersey side of the Delaware River. Delaware has also recently applied its state permitting laws to other projects on the New Jersey side, including an historic pier in Penns Grove, New Jersey, on riparian lands granted by New Jersey in 1916 and 1921.

New Jersey has protested Delaware's assertions of jurisdiction, but its efforts to resolve this conflict amicably have been unsuccessful. Accordingly, New Jersey seeks to reopen No. 11, Original, pursuant to paragraph 5 of the 1935 Decree, in order to obtain a supplemental decree clarifying New Jersey's rights and enjoining Delaware from asserting riparian jurisdiction over proposed waterfront improvements on New Jersey's side of the Delaware River within the Twelve-Mile Circle.

The Court should exercise its continuing jurisdiction under the 1935 Decree to resolve this dispute. The controversy is grave and important. Its resolution will determine whether New Jersey can exercise its sovereign right to regulate the riparian rights of its own citizens along its own shoreline within the Twelve-Mile Circle, free of regulation by Delaware. The answer also will determine whether Delaware can interfere with New Jersey's regulation of growth and development in this area. No alternative forum exists to resolve this issue, and only this Court can interpret the 1905 Compact in a manner that will bind its signatories.

The plain language of the 1905 Compact expressly confirmed that New Jersey would be able to exercise exclusive State riparian jurisdiction over structures on its own side of the Delaware River. Article VII provided that each State, "on its *own* side of the river," may "*continue*" to

exercise "*riparian jurisdiction* of *every kind and nature*" under the "laws of the *respective* states" (emphasis added.) These words demonstrate that such "riparian jurisdiction" would be interpreted broadly and that each State would be able to exercise exclusive "riparian jurisdiction" on its side of the River. The use of the word "continue" is also significant. Long before the Compact of 1905, New Jersey regulated riparian grants and improvements on its side of the River, including within the Twelve-Mile Circle. New Jersey continued to do so after the Compact of 1905. And it is only relatively recently that Delaware has attempted to interfere with New Jersey's exercise of its riparian jurisdiction.

Because the Compact is clear and unambiguous, it is unnecessary to appoint a special master. New Jersey respectfully submits that the case should be briefed, argued, and decided in the October 2005 term.

STATEMENT OF THE CASE

A. *New Jersey v. Delaware I* and the Compact of 1905.

The Compact of 1905 resulted from a dispute over the States' competing claims of sovereignty and jurisdiction in the Delaware River. In 1871, Delaware enacted a law that required non-residents to obtain a Delaware license to fish in the River. (Record, No. 11, Orig., Pl. Ex. 161 at 10.) When Delaware arrested New Jersey fishermen pursuant to this law in 1872, New Jersey's Governor protested this infringement upon the State's authority and issued a proclamation asserting New Jersey's claim to jurisdiction over the eastern half of the Delaware River. (*Id.* at 7, 10.)

When the States' efforts to settle the dispute proved unsuccessful, New Jersey filed suit here to determine the boundary line in the Delaware River. (*Id.* at 23-25.) This Court granted New Jersey leave to file a bill of complaint ("*New Jersey v. Delaware I*") (Record, No. 1, Orig., at 5), and issued a preliminary injunction restraining Delaware "from imposing any tax, assessment or imposition whatsoever, by way of license fee or otherwise, upon any citizen or resident of the State of New Jersey . . . for right or authority to fish in the river Delaware, as they have heretofore been accustomed . . . until this court shall make other order to the contrary." (*Id.* at 53-54.) This Court's preliminary injunction order explained that "for a long period of time, to wit, more than seventy years last past, the State of New Jersey has claimed and exercised jurisdiction over the easterly portion of the river Delaware to the middle of the same . . . ." (*Id.* at 53.)

With the preliminary injunction in place, the case lingered for over twenty-five years until, in 1903, the States appointed commissioners to resolve the dispute. (Record, No. 11, Orig., Pl. Ex. 161 at 25-33.) The commissioners met in Philadelphia on March 12 and 14, 1903, and they negotiated the text of what later became the Compact of 1905. (*Id.* at 29-31.)

The Compact did not establish the boundary line, but it did resolve numerous jurisdictional issues. The Compact established the authority of each State to serve criminal and civil process on the River (Articles I, II). (App. 2a-3a.) It addressed common fishing rights and laws (Articles III-VI). (App. 3a-5a.) Article VII, at issue in this case, specifically confirmed each State's riparian rights and jurisdiction to regulate such rights. (App. 5a.)

Article VIII of the Compact provided: "[n]othing herein contained shall affect the territorial limits, rights or jurisdiction of either State of, in, or over the Delaware River, or the ownership of the subaqueous soil thereof, except as herein expressly set forth." (App. 5a.)

Article IX provided that, once approved by the States and ratified by Congress, the Compact "shall be and become binding in perpetuity upon both of said States; and thereupon the suit now pending in the Supreme Court . . . shall be discontinued . . . without prejudice." (App. 6a.)

In describing the Compact to the New Jersey Legislature, the New Jersey commissioners stated:

> [W]hile it was not found practicable to settle the exact geographical boundary line between the two States, nevertheless every interest of the State of New Jersey has been protected, all its riparian, fishery and other rights and jurisdiction thoroughly safeguarded and every question of practical difficulty between the two States settled for all time. (Record, No. 11, Orig., Pl. Ex. 161 at 29.)

Although Delaware initially failed to approve the Compact, the States reappointed commissioners and, in 1905, quickly agreed to the same provisions as in 1903. (Record, No. 11, Orig., Pl. Ex. 161 at 32-34, Pl. Ex. 162 at 13-15.) Delaware approved the Compact on March 20, 1905, 23 Del. Laws ch. 5 (1905), and New Jersey did so the next day, 1905 N.J. Laws ch. 42, p.67. Congress ratified the Compact on January 24, 1907, with the proviso that "nothing contained therein shall be construed to impair or in any manner affect any right or jurisdiction of the United States in

and over the islands or waters which form the subject of said agreement." Act of Jan. 24, 1907, ch. 394, 34 Stat. 858 (1907). *New Jersey v. Delaware I* was then dismissed without prejudice. 205 U.S. 550 (1907).

B. New Jersey's Exercise of Riparian Jurisdiction.

New Jersey has regulated its riparian lands, including within the Twelve-Mile Circle, since the 1800s. Before 1851, State riparian lands were regulated primarily through local custom. (*See* Castagna Aff. ¶ 3, App. 28a.)[3] In 1851, the Legislature enacted the Wharf Act, which required riparian landowners to obtain permission from their counties for development that would extend past the mean low-water line. 1851 N.J. Laws 335. The Wharf Act also provided that such permission could not be granted if the development would hinder navigation. *Id.* Then, in 1864, the Legislature created the Board of Riparian Commissioners, the earliest predecessor to the current Tidelands Resource Council. N.J. Stat. Ann. § 12:3-1 (1979) (enacted in 1864). The Board subsequently was authorized and directed to set bulkhead and pierhead lines in certain areas of the State. N.J. Stat. Ann. § 12:3-2 (1979) (enacted in 1869). In 1871, the Board's authority was expanded to encompass all tidal waters of the State, and included authority over approval of grants or leases of State riparian interests. N.J. Stat. Ann. § 12:3-10 (1979) (enacted in 1871).

Since its formation, the Tidelands Resource Council and its predecessors have determined whether to convey riparian lands or rights and have imposed regulatory conditions on such conveyances. (*See* Castagna Aff. ¶¶ 6, 7,

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[3] "Castagna Aff." refers to the Affidavit of Richard Castagna in Support of Motion To Reopen And For A Supplemental Decree, found at App. 25a.

App. 28a, 29a.) In 1914, the Legislature enacted the Waterfront Development Law. N.J. Stat. Ann. § 12:5-3 (1979). The law required that permits be obtained from the Board of Commerce and Navigation (later made part of the Department of Environmental Protection) to build structures on riparian lands or to legalize structures already in place. *Id.* New Jersey's approach to regulating the State's riparian lands has remained essentially unchanged since 1914, except that in 1978 the Tidelands Resource Council determined that its conveyances would be conditioned upon an applicant's obtaining all required State, federal, and local regulatory permits. (*See* Castagna Aff. ¶ 7, App. 29a.)

From its earliest days, the State of New Jersey has applied its regulatory system to lands on the New Jersey side of the Delaware River within the Twelve-Mile Circle. Indeed, on at least eight occasions from 1854 to 1905, the New Jersey Legislature and then the Board of Riparian Commissioners approved various riparian grants extending below the mean low-water line in the Twelve-Mile Circle area. (*See* Castagna Aff. ¶ 8, App. 29a, 31a-36a, 54a.) And from 1905 to the present, New Jersey has exercised its riparian jurisdiction in this area on at least thirty-three occasions by approving State tidelands conveyances within the Twelve-Mile Circle. (*Id.*, App. 29a, 36a-51a, 54a.)[4]

In recent decades, the Legislature has further expanded New Jersey's regulation of riparian lands, including those within the Twelve-Mile Circle, by imposing additional regulatory and permitting requirements. (*See* Reading Aff. ¶¶ 3-5, App. 56a-57a; Sickels Aff. ¶¶ 2-6, App.

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[4] A map showing the approximate location of New Jersey's riparian grants within the Twelve-Mile Circle is found at App. 54a.

62a-63a; Broderick Aff. ¶¶ 4-5, App. 67a-68a.)[5] New Jersey has applied these expanded requirements to dredging, pier construction, discharge pipes and water diversion structures located outshore of the low-water line within the Twelve-Mile Circle. (*See* Reading Aff. ¶¶ 9-13, App. 58a-60a; Sickels Aff. ¶¶ 7-9, App. 63a-64a; Broderick Aff. ¶¶ 11-16, App. 70a-72a.)

C. *New Jersey v. Delaware II.*

Although the 1905 Compact resolved many issues, the boundary line remained undetermined. In 1925 and 1926, a dispute over the ownership of an oyster bed in the Delaware Bay south of the Twelve-Mile Circle rekindled the controversy. (Record, No. 11, Orig., Pl. Ex. 107, 108.) The parties were again unable to resolve the dispute (which had been left open by Article VI of the Compact of 1905), (*id.*, Pl. Ex. 5), and this Court granted New Jersey leave to file suit to determine the line along the entire boundary, both within and below the Twelve-Mile Circle ("*New Jersey v. Delaware II*"). *See* 279 U.S. 825 (1929). The Court appointed a Special Master, who submitted his report on October 9, 1933. 55 S.Ct. 934 (1933). Both States filed exceptions.

On February 5, 1934, the Court confirmed the Special Master's report. 291 U.S. at 385. Within the Twelve-Mile Circle, the Court set the boundary line at the mean low-water line on the New Jersey shore, "subject to the Compact of 1905." *Id.* South of the Twelve-Mile Circle, the Court set the line at the middle of the main shipping channel.

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[5] "Reading Aff.," "Sickels Aff.," and "Broderick Aff." refer to the Affidavits of Jeffrey T. Reading, Frederick Sickels, and Kevin Broderick in Support of Motion To Reopen And For A Supplemental Decree, found respectively at App. 55a, 61a, and 66a.

Id. The Decree provided: "The State of Delaware, its officers, agents and representatives, its citizens and all other persons, are perpetually enjoined from disputing the sovereignty, jurisdiction and dominion of the State of New Jersey over the territory adjudged to the State of New Jersey by this decree . . . ." 295 U.S. at 698. The Decree was "without prejudice to the rights of either state, or the rights of those claiming under either of said states, by virtue of the compact of 1905 between said states . . . ." *Id.* at 699.

D. The Present Controversy.

1. Delaware's Recent Regulation of Structures on New Jersey's Shore.

In 1957 and 1958, the Delaware State Highway Department acknowledged that, under Article VII of the Compact of 1905, Delaware lacked riparian jurisdiction over the construction of improvements appurtenant to the New Jersey side of the River within the Twelve-Mile Circle. (*See* Donlon Aff. ¶¶ 7-8 & Ex. C-G, App. 87a-89a, 102a-110a.)[6] Delaware at that time conceded that such improvements were subject solely to New Jersey's authority. (*Id.*) In more recent years, however, Delaware has asserted jurisdiction over such projects on the New Jersey side.

In 1971, Delaware adopted the Delaware Coastal Zone Act, 58 Del. Laws ch. 175 (1971), codified at Del. Code Ann. tit. 7, §§ 7001-7013 (2005) (the "DCZA"). The DCZA declares that it is Delaware's policy "to prohibit entirely the construction of new heavy industry in its coastal

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[6] "Donlon Aff." refers to the Affidavit of Amy C. Donlon, Deputy Attorney General, State of New Jersey, in Support of Motion To Reopen And For A Supplemental Decree, found at App. 84a.

areas, which industry is determined to be incompatible with the protection of that natural environment in those areas." *Id.* § 7001. The DCZA prohibits "bulk product transfer facilities" in the coastal zone, except for those in the Port of Wilmington. *Id.* §§ 7002(f), 7003. Industrial development other than that of heavy industry requires a permit issued by the Secretary of the Delaware Department of Natural Resources and Environmental Control ("DNREC"). *Id.* § 7004. Persons who violate the DCZA are subject to a fine of up to $50,000 per day for each day of the violation. *Id.* § 7011.

In 1986, Delaware enacted the Subaqueous Lands Act, 65 Del. Laws ch. 508 (1986), codified at Del. Code Ann. tit. 7, §§ 7201-7217 (2005) (the "DSLA"). The DSLA provides that "[n]o person shall deposit material upon or remove or extract materials from, or construct, modify, repair or reconstruct, or occupy any structure or facility upon submerged lands or tidelands without first having obtained a permit, lease or letter of approval from the Department." *Id.* § 7205(a). The DSLA also provides "[t]here shall be no appeal of a decision by the Secretary to deny a permit on any matter involving state-owned subaqueous lands." *Id.* § 7210. Violations of the DSLA are punishable by civil fines and criminal penalties. *Id.* § 7214.

Delaware has applied these laws to a limited number of projects on the New Jersey side of the River, and just this year actually invoked these laws to block a project on New Jersey's side.

On December 13, 1991, DNREC issued a DCZA permit to Keystone Cogeneration Systems, Inc., now known as Logan Generating Company, L.P. ("Logan"), to construct a pier and water intake structure in the Delaware River to service a 225-MW coal fired power plant in New Jersey.

(*See* Donlon Aff. ¶ 26, App. 96a.) To New Jersey's knowledge, since 1991, the only other applicant for a DCZA permit for the construction of an improvement appurtenant to the New Jersey shore has been Crown Landing LLC, an affiliate of BP America, Inc., whose DCZA application was denied just this year.

In the case of Crown Landing, Delaware withheld a DCZA permit in March 2005, effectively blocking the project. (Segal Dec. ¶¶ 9-22, App. 137a-142a.)[7] Crown Landing is seeking to construct and operate a liquefied natural gas ("LNG") import terminal and re-gasification facility in Logan Township, New Jersey. (*Id.* ¶ 2, App. 133a-134a.) The LNG facility will be located entirely within New Jersey, but the project depends on an unloading pier extending into the Delaware River approximately 2,000 feet beyond the low-water mark. (*Id.* ¶ 4, App. 134a-135a.) The facility is supported by the New Jersey Board of Public Utilities as a means to increase the "vital" supply of natural gas to New Jersey. (*Id.* ¶ 8 & Ex. 4, App. 137a, 150a-151a; Fox Aff. ¶ 15, App. 82a.)[8]

Crown Landing initially applied for a DSLA permit for the pier in September 2004, but Delaware declined to issue the DSLA permit until Crown Landing first obtained a DCZA permit. (Segal Dec. ¶¶ 10-11, App. 138a.) Accordingly, on December 7, 2004, Crown Landing submitted to the Secretary of DNREC a request for a status decision that the Crown Landing pier was permitted by the DCZA. (*Id.* ¶ 14, App. 139a.) On February 3, 2005, the

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[7] "Segal Dec." refers to the Declaration of Lauren B. Segal, found at App. 133a.

[8] "Fox Aff." refers to the Affidavit of Jeanne M. Fox in Support of Motion To Reopen And For A Supplemental Decree, found at App. 78a.

Secretary determined that the LNG facility was an "offshore bulk transfer facility" as well as a "heavy industry use" specifically prohibited by the DCZA. (*Id.* ¶ 15 & Ex. 2, App. 139a, 146a-147a.) He also concluded that the "on-shore storage tanks essential to the operation of the facility," although located in New Jersey, "are prohibited structures." (App. 147a.) The Secretary explained that, "[d]espite the benefits that increased LNG imports might bring, placement of this facility within the boundaries of Delaware is, in my opinion, clearly a prohibited use within Delaware's coastal zone." (*Id.* ¶ 16 & Ex. 2, App. 139a-140a, 147a.) On March 30, 2005, the Delaware Coastal Zone Industrial Control Board affirmed the Secretary's decision. (*Id.* ¶ 17, App. 140a.) The decision has now become final. (*Id.* ¶ 19, App. 140a-141a.)

Similar to Delaware's permitting actions under the DCZA, only a few applicants have requested DSLA approvals for improvements on the New Jersey side of the River. (*See* Donlon Aff. ¶ 6, App. 86a.) DNREC issued a DSLA permit to Logan on September 30, 1991 for the pier and water intake for which Logan obtained a DCZA permit. (*Id.* ¶ 18, App. 93a.) In 1996, as part of a joint project to reestablish historical ferry service between the two States, the New Jersey Division of Parks and Forestry obtained a DNREC subaqueous lands lease for construction of a pier adjacent to Ft. Mott State Park in Salem County, New Jersey. (*Id.* ¶ 20, App. 93a-94a.)

Just this year, DNREC approved a DSLA permit for Fenwick Commons, LLC, for the renovation of a marina and piers appurtenant to "The Riverwalk at Penns Grove," a redevelopment project in the Borough of Penns Grove, New Jersey, (*id.* ¶¶ 21-22 & Ex. M, App. 94a-95a, 131a-132a), and also issued Fenwick Commons a determination, pursuant to § 307 of the federal Coastal Zone Management Act, 16

U.S.C. § 1456 (the "FCZMA"), that its project was consistent with Delaware's coastal zone management plan (Donlon Aff. ¶ 21, App. 94a).[9] New Jersey has asserted jurisdiction over this specific structure for the last 150 years – by legislative action in 1855, by executive actions in 1916 and 1921, and by judicial actions in 1958 and in 1962. (Castagna Aff. ¶ 8(1), (12), (19), App. 31a, 36a-37a, 40a.)

Fenwick Commons notified Delaware on May 6, 2005, that "[f]inancing considerations" compelled it to obtain the Delaware permit in order to proceed with the project. (Donlon Aff. ¶ 22 & Ex. M, App. 94a-95a, 131a-132a.) But Fenwick Commons nonetheless stated: "the issue as to ownership of lands is in dispute as to the Riparian Grants from the State of New Jersey . . . . Our position is that we will leave the issue of riparian rights and Delaware ownership to be resolved at a different time and in a different for[u]m." (*Id.*)

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[9] The FCZMA was enacted in 1972 to encourage coordination and cooperation between federal, state, and local coastal zone management activities, *see* 16 U.S.C. § 1452(4),(5), but does not modify or supersede any interstate compact. 16 U.S.C. § 1456(e)(1). After the enactment of the FCZMA, New Jersey prepared its own coastal zone management plan in which it recognized potential conflicts that could arise with Delaware over regulation of projects within the Twelve-Mile Circle and the need for coordination between the States for such projects. (*See* Affidavit of Steven Whitney in Support of Motion To Reopen And For A Supplemental Decree ("Whitney Aff.") ¶¶ 2, 3, App. 73a-75a.) For a period of time, New Jersey and Delaware sought a means for resolving these potential conflicts between each State's coastal zone management policies through a formal agreement. (*See id.* ¶¶ 6, 7, App. 75a-76a.) However, New Jersey subsequently abandoned those efforts because of concerns that such an agreement would create an overly cumbersome approval process and would give Delaware effective veto power over projects on the New Jersey side of the Delaware River that met New Jersey standards. (*See id.* ¶ 8, App. 76a.)

2. New Jersey's Efforts to Resolve the Controversy.

Delaware's actions have precipitated a serious controversy between the States. New Jersey state officials have sought, without success, to persuade Delaware that its assertion of jurisdiction over improvements appurtenant to the New Jersey shoreline violates Article VII of the Compact of 1905. On April 11, 2005, following informal efforts to reach a settlement, Paul T. Fader, Chief Counsel to the Acting Governor of New Jersey, Richard J. Codey, formally advised his Delaware counterpart, Joseph C. Schoell, Legal Counsel to Delaware Governor Ruth Ann Minner, that, under the Compact of 1905, "Delaware does not have jurisdiction over the construction of this project or any project appurtenant to New Jersey's shoreline." (App. 17a-18a.) New Jersey cited the plain language of Article VII, this Court's holding in 1934 that the boundary determination was "subject to the Compact of 1905," and this Court's recent opinion in *Virginia v. Maryland*, 540 U.S. 56 (2003), deciding a similar issue under the 1785 Compact between Virginia and Maryland. (App. 17a-20a.) Delaware responded on May 9, 2005, arguing that the Compact of 1905 limited New Jersey's riparian jurisdiction solely to New Jersey's territory above the low-water mark on the New Jersey shore. (App. 21a-24a.)

The New Jersey Legislature has likewise protested Delaware's exercise of permitting authority over structures appurtenant to the New Jersey shoreline. On May 16, 2005, the New Jersey State Assembly unanimously adopted a resolution urging the Governor and General Assembly of Delaware to amend the DCZA to make clear that it "does not apply to facilities over which New Jersey retains riparian jurisdiction pursuant to Article VII of the Compact." (App.

155a-158a.) A nearly identical resolution is pending in the New Jersey Senate. (App. 159a-164a.)

Concerned that Delaware's continued assertion of regulatory authority "effectively restricts industrial development and significantly chills other development on the New Jersey shoreline within the twelve-mile circle of New Castle, Delaware," thirty-one New Jersey legislators recently introduced a bill requiring that New Jersey state pension funds be withdrawn from Delaware banks unless Delaware conforms its permitting laws to respect New Jersey's rights under the 1905 Compact. (App. 261a-265a.) Two Delaware legislators subsequently introduced legislation authorizing the Governor to call on the National Guard of Delaware to remove any "encroachments" upon Delaware's boundary. (App. 266a-268a.)[10]

LEGAL ARGUMENT

I.

THE COURT SHOULD EXERCISE ITS CONTINUING ORIGINAL JURISDICTION TO ENFORCE THE 1905 COMPACT.

Article III, Section 2, Clause 2 of the Constitution of the United States grants original jurisdiction to the Supreme Court "[i]n all Cases . . . in which a State shall be Party . . . ." Congress has additionally provided that this Court "shall have original and exclusive jurisdiction of all controversies

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[10] Conceivably, this bill would authorize Delaware's National Guard to remove any structure outshore of New Jersey's low-water mark, including any historic pier that long ago received approval from New Jersey but which Delaware has not previously attempted to regulate.

between two or more States." 28 U.S.C. § 1251(a). An exercise of this Court's original jurisdiction is necessary here in order to enforce New Jersey's rights under Article VII of the 1905 Compact, which were specifically preserved by this Court in the 1935 Decree.

As noted above, although the Court in 1934 established the boundary within the Twelve-Mile Circle at the low-water mark on the New Jersey side, that ruling was "subject to the Compact of 1905." *New Jersey v. Delaware II*, 291 U.S. at 385. The Decree issued by the Court in 1935 provided: "The State of Delaware, its officers, agents and representatives, its citizens and all other persons, are perpetually enjoined from disputing the sovereignty, jurisdiction and dominion of the State of New Jersey over the territory adjudged to the State of New Jersey by this decree . . . ." 295 U.S. at 698. The Decree also provided that it was "without prejudice to the rights of either state, or the rights of those claiming under either of said states, by virtue of the compact of 1905 between said states . . . ." *Id.* at 699. The Court "retain(ed) jurisdiction of this cause for the purpose of any order or direction, or modification of this decree, or any supplemental decree, which it may at any time deem to be proper in order to carry into effect any of the provisions of this decree . . . ." *Id.* at 698.

Since Delaware has now made it clear that it will not respect New Jersey's exercise of riparian jurisdiction over structures appurtenant to the New Jersey side of the River within the Twelve-Mile Circle, it is appropriate to reopen *New Jersey v. Delaware II* to confirm that the 1935 Decree protects New Jersey's rights under the Compact.

In *Mississippi v. Louisiana*, 506 U.S. 73 (1992), the Court identified two factors to be considered in determining whether to exercise its original jurisdiction. *Id.* at 77. First,

the Court must consider the interests of the complaining state, focusing on the "seriousness and dignity" of the claim. *Id.* (internal quotation marks omitted). Second, the Court must consider whether there is an alternative forum in which the issues tendered can be fully resolved. *Id.* It is not clear to what extent this traditional two-factor test for exercising original jurisdiction applies when, as in this case, the Court has retained continuing jurisdiction pursuant to an earlier decree.[11] Nevertheless, even if that two-factor test is applicable here, this controversy warrants the Court's exercise of original jurisdiction.

First, the matters in controversy are grave and important. This case will decide whether New Jersey can exercise its sovereign right to regulate the riparian rights of its own citizens along its own shoreline within the Twelve-Mile Circle, free of regulation by Delaware, and whether Delaware can interfere with New Jersey's control of growth and development in this area. The answer depends on this Court's interpretation of the 1905 Compact that settled the States' litigation in *New Jersey v. Delaware I*, and that was specifically preserved in this Court's opinion and decree in *New Jersey v. Delaware II*. The "seriousness and dignity" requirement is clearly met here. Indeed, the Court recently asserted original jurisdiction over a very similar dispute between Virginia and Maryland, concluding that Virginia alone had the right to regulate the riparian rights of its own citizens in the Potomac River under the Compact of 1785, notwithstanding that waterfront projects in Virginia extended

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[11] The Court included a similar continuing jurisdiction provision in its decree in *Nebraska v. Wyoming*, 325 U.S. 589, 671-72 (1945) (No. 6, Orig.). Over forty years later, Nebraska filed a Motion for Leave to File a Petition for an Order Enforcing Decree and for Injunctive Relief. The Court granted Nebraska's motion and docketed the case as No. 108, Original. 479 U.S. 1051 (1987).

across the boundary line into Maryland. *Virginia v. Maryland*, 540 U.S. at 71-72.[12]

Second, no alternative forum exists where the Compact question can be resolved. So far in 2005, Delaware has twice asserted jurisdiction over two major developments within New Jersey's riparian jurisdiction – Crown Landing's LNG project and Fenwick Commons' Riverwalk. Delaware barred construction of the Crown Landing facility, and that action has become final. (Segal Dec. ¶ 19, App. 140a-141a.) By contrast, Delaware approved the Riverwalk project even though Fenwick Commons reserved its objection to Delaware's assertion of authority. (Donlon Aff. ¶¶ 21-22 & Ex. M, App. 94a-95a, 131a-132a.) Neither landowner is currently litigating Delaware's claimed authority. Accordingly, just as in *Wyoming v. Oklahoma*, 502 U.S. 437 (1992), "no pending action exists to which [this Court] could defer adjudication on this issue." *Id.* at 452.

Even if Delaware provided a venue in which private entities could challenge Delaware's assertion of riparian jurisdiction, New Jersey's sovereign interests would not be directly represented. More importantly, a Delaware venue clearly would not provide New Jersey an adequate forum in which to seek redress for Delaware's challenge to its sovereignty. As this Court has recognized, "[i]t requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States . . . can be unilaterally

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[12] The Court's decision to resolve this controversy will defuse the increasing tensions between the States illustrated by recent bills introduced in both States' legislatures. *See supra* at 16-17. This escalating dispute presents the "model case" for the Court's original jurisdiction, without which the controversy "would amount to *casus belli* if the States were fully sovereign." *Mississippi v. Louisiana*, 506 U.S. at 77 (internal quotation marks omitted); *see also Oklahoma v. New Mexico*, 501 U.S. 221, 241 (1991).

nullified, or given final meaning by an organ of one of the contracting States." *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951). The ability to invoke the jurisdiction of the Supreme Court to enforce an interstate compact represents an important element of a State's willingness to enter such agreements, since it is difficult to conceive why a state would enter a compact if it had to seek redress for violations in the courts of the other state. *See Texas v. New Mexico*, 462 U.S. 554, 569 (1983).

In addition to the two factors identified by the Court in *Mississippi v. Louisiana*, the Court has generally limited its exercise of original jurisdiction to matters which constitute a justiciable case or controversy within the meaning of the Constitution. *Massachusetts v. Missouri*, 308 U.S. 1, 15 (1939). This requires a determination that a state has suffered an apparent wrong by another state's actions which furnishes grounds for judicial redress, or that it asserts a judicially enforceable right under accepted principles of common law or equity. *Id.* To the extent that this requirement applies when the Court has retained jurisdiction of a prior dispute, New Jersey is asserting an injury to an enforceable right based on Delaware's assertion of jurisdiction over riparian development on the New Jersey shore, in violation of the 1905 Compact. *See Oklahoma v. New Mexico*, 501 U.S. 221, 236 n.5 (1991) (a compact not only has the force of federal law, but constitutes a contract between the participating states).

Moreover, Delaware's assertion of jurisdiction clearly presents a justiciable case or controversy. Delaware's rejection of the Crown Landing project and its actions regarding the Riverwalk project are a direct affront to New Jersey's right to act in the interests of its citizens to regulate growth and development along its own shoreline. Delaware's interference could discourage development

applications in this area of New Jersey's shoreline by requiring approval from two separate States. (Castagna Aff. ¶ 12, App. 52a.) Further, reduced riparian development could in the long term reduce the income realized by the New Jersey School Fund, the beneficiary of money received from riparian grants. (*Id.* ¶ 13, App. 52a.) Delaware's actions also affect the property rights held by the State of New Jersey itself, since New Jersey could be required to seek regulatory approvals from Delaware to develop public lands that it owns within the Twelve-Mile Circle. (*Id.* ¶ 11, App. 52a.) Arguably, Delaware's assertion of jurisdiction could subject New Jersey employees to criminal penalties for taking soil samples on the New Jersey side of the Delaware River if this were done without obtaining a permit from Delaware. *See* Del. Code Ann. tit. 7, §§ 7205, 7214 (2005). (*See also* Segal Dec. ¶ 10, App. 138a.)

In short, Delaware's assertion of riparian jurisdiction in violation of the 1905 Compact presents a clear case or controversy requiring resolution by the only tribunal authorized to interpret the Compact in a manner binding on both States. New Jersey has properly invoked this Court's original jurisdiction.

II.

THE COURT SHOULD ENJOIN DELAWARE FROM FURTHER VIOLATIONS OF THE 1905 COMPACT.

Delaware has made clear that it will not respect New Jersey's exercise of exclusive riparian jurisdiction over improvements appurtenant to the New Jersey shoreline within the Twelve-Mile Circle, as reserved by the Compact. Accordingly, this Court should reopen *New Jersey v. Delaware II* and issue a supplemental decree to confirm New

Jersey's rights under the 1905 Compact and to enjoin Delaware from further interfering with those rights.

A compact is "a contract .... It remains a legal document that must be construed and applied in accordance with its terms." *Texas v. New Mexico*, 482 U.S. 124, 128 (1987) (internal quotations and citations omitted). In addition, "congressional consent 'transforms an interstate compact . . . into a law of the United States' . . . ." *New Jersey v. New York*, 523 U.S. 767, 811 (1998) (quoting *Cuyler v. Adams*, 449 U.S. 433, 438 (1981)). "Once a compact between States has been approved [by Congress], 'it settles the line or original right; it is the law of the case binding on the states and its citizens, as fully as if it had never been contested.'" *New Jersey v. New York*, 523 U.S. at 810 (quoting *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 727 (1838)). "Just as if a court were addressing a federal statute, then, the 'first and last order of business' of a court addressing an approved interstate compact 'is interpreting the compact.'" *New Jersey v. New York*, 523 U.S. at 811 (quoting *Texas v. New Mexico*, 462 U.S. at 567-68); *Virginia v. Maryland*, 540 U.S. at 66.

"Accordingly, where the terms of the compact are unambiguous, this Court must give effect to the express mandate of the signatory States." *Oklahoma v. New Mexico*, 501 U.S. at 245 (Rehnquist, C.J., concurring in part and dissenting in part). In this case, interpretation of the 1905 Compact presents a clear issue of law that should be decided in favor of New Jersey.

A. The Plain and Unambiguous Language of the Compact of 1905 Confirms that New Jersey Retained Riparian Jurisdiction Over Structures Extending Below the Low-Water Mark on the New Jersey Shore, Free From Regulation by Delaware.

Article VII of the 1905 Compact provides:

> Each State may, on its own side of the river, continue to exercise riparian jurisdiction of every kind and nature, and to make grants, leases, and conveyances of riparian lands and rights under the laws of the respective States. Act of Jan. 24, 1907, ch. 394, 34 Stat. 858 (1907). (App. 5a.)

The use of the phrase "riparian jurisdiction" connotes State sovereignty over riparian improvements. "Riparian" derives from the Latin word "ripa," meaning "shore of the river," and is defined as "[o]f or pertaining to the bank of a river; as, riparian rights." Webster's Unabridged Dictionary 1244 (1898). And "jurisdiction," as used in Article VII, refers to the "authority of a sovereign power to govern or legislate." *Id.* at 806. Thus, the term "riparian jurisdiction" clearly refers to each State's sovereign authority to regulate activities on its own shores of the Delaware River.

At the time of the 1905 Compact, "riparian jurisdiction" also was clearly understood in both States to encompass the regulation of improvements extending outshore of the low-water mark. It has long been recognized that a primary objective of riparian improvements is the ability to wharf out from the shore, beyond the low-water mark, as necessary to gain access to navigable waters.

See Mayor of Newark v. Sayre, 45 A. 985, 990 (N.J. 1900). Delaware has similarly recognized that "[a]mong the riparian property rights associated with ownership of the foreshore is the right to wharf out directly from the foreshore to the bulkhead line and the right to have free access to the navigable portion of a river." *City of Wilmington v. Parcel of Land*, 607 A.2d 1163, 1168 (Del. 1992) (citing *Harlan & Hollingsworth Co. v. Paschall*, 5 Del. Ch. 435, 456-57 (Del. Ch. 1882)). And, as this Court recognized in *New Jersey v. Delaware II*, "riparian proprietors have very commonly enjoyed the privilege of gaining access to a stream by building wharves and piers . . . ." 291 U.S. at 375.

Article VII of the 1905 Compact makes clear that such jurisdiction is to be interpreted broadly. It is jurisdiction "of every kind and nature." Moreover, Article VII specifically confirmed that each State would be able to exercise its riparian jurisdiction exclusive of the other's. Each State would be able to exercise its authority "on its own side of the river" pursuant to "the laws of the respective States." This means that each State's exercise of its riparian jurisdiction would not be interfered with by the other State.

The use of the term "continue" is also of critical importance because it shows that the States intended that their riparian sovereignty could carry on in the same manner as had been exercised in the past. Before the Compact was enacted, New Jersey had exercised riparian jurisdiction over the construction of docks, wharves, piers, and other waterfront developments, pursuant to statutes that applied to all of the State's waterfront, including within the Twelve-Mile Circle. *See, e.g.*, 1851 N.J. Laws 335; N.J. Stat. Ann. § 12:3-10, -12, -21.[13] Further, it was well established before

[13] This included dredging to reach the navigable channel. *See* N.J. Stat. Ann. § 12:3-21 (1979) (enacted in 1891).

the 1905 Compact that the right to build riparian improvements was subject to state regulation. *E.g., Weber v. Board of Harbor Comm'rs*, 85 U.S. (18 Wall.) 57, 64-65 (1873) (riparian proprietor may construct wharves or piers "subject to such general rules and regulations as the legislature may prescribe for the protection of the public").

On at least eight occasions prior to 1905, New Jersey had issued grants for riparian lands and structures extending well below the low-water mark on the New Jersey side within the Twelve-Mile Circle. (*See* Castagna Aff. ¶ 8, App. 29a, 31a-36a, 54a.) As part of this grant process, New Jersey imposed appropriate regulatory conditions on those conveyances, such as prohibiting "the extension of such docks or wharves so far into said river as to injure or impede the navigation of the same." *E.g.*, 1854 N.J. Laws ch. 143, § 1; 1855 N.J. Laws ch. 109, § 4 (same); 1871 N.J. Laws ch. 307, § 1 ("provided, however, that no such wharf, pier or bulkhead shall be erected or built . . . for a greater distance than one hundred feet beyond low water mark, nor in front of the land of any other person"). Thus, when the Compact of 1905 provided that the States would "continue" to exercise "riparian jurisdiction of every kind and nature" under the "laws of the respective states," it confirmed that New Jersey would continue to exercise riparian jurisdiction in the same manner to which it had been historically accustomed: free of regulation or interference by Delaware.

Other provisions of the Compact reinforce this conclusion. Articles I and II limit the States from asserting jurisdiction over wharves or docks attached to the other State by prohibiting the service of process by one State aboard a vessel attached to a pier or wharf on the banks of the other. This language recognizes a unique status for such riparian structures under the Compact and underscores the intent of the drafters to ensure that wharves and piers were subject

solely to the jurisdiction of the State to whose riverbank they were attached. Similarly, Article IV called for the enactment of concurrent fishing laws, and Article V provided for each State's fishing laws to continue in effect until such concurrent laws were passed. Just as in *Virginia v. Maryland*, "the drafters carefully delineated the instances in which the citizens of one State would be subject to the regulatory authority of the other." 540 U.S. at 67. If the drafters of Article VII had intended for Delaware to have either exclusive or concurrent authority to regulate New Jersey's riparian improvements, they would have said so.

B. Delaware's Previous Admissions and the Parties' Construction of the Compact Demonstrate New Jersey's Right to Regulate Riparian Users On Its Own Side of the River, Free From Regulation by Delaware.

The actions by both New Jersey and Delaware since the 1905 Compact confirm that New Jersey retained exclusive riparian jurisdiction on its own side of the Delaware River, free from regulation by Delaware.

1. Delaware's Concessions in *New Jersey v. Delaware II* Confirm that New Jersey Has Exclusive State Riparian Jurisdiction.

The 1905 Compact was at issue in *New Jersey v Delaware II*. New Jersey argued that the long history of riparian improvements by New Jersey citizens established New Jersey's ownership in parts of the Delaware riverbed outshore of the mean low-water line within the Twelve-Mile Circle, and that the 1905 Compact confirmed this ownership. (App. 171a-175a.) While disputing New Jersey's claims of ownership, Delaware conceded both the right of New Jersey citizens to wharf out to navigable water and the exclusive

right of New Jersey to regulate the exercise of those riparian rights.

In its Reply Brief to the Special Master, Delaware clearly conceded that New Jersey enjoyed exclusive regulatory jurisdiction over its riparian lands, stating: "Article VII of the Compact is obviously merely a recognition of the rights of the riparian owners of New Jersey *and a cession to the State of New Jersey by the State of Delaware of jurisdiction to regulate those rights*." (App. 186a (emphasis added).) Delaware further conceded New Jersey's exclusive regulatory authority over such rights in its oral argument before the Special Master:

> We say moreover that the Compact of 1905 expressly acknowledged the rights of the citizens of New Jersey, at least, by implication to wharf out, and in my view the Compact of 1905 *ceded* to the State of New Jersey *all the right to control the erection of those wharves and to say who shall erect them, and it was a very sensible thing to do.* (App. 191a (emphasis added).)

The Special Master accepted Delaware's concessions. He concluded that Delaware's "dominion and jurisdiction" in the River was "*modified* by the compact of 1905 between the States of Delaware and New Jersey." (App. 255a (emphasis added).) "Under this Compact clearly all improvements made by riparian owners upon the shore of either State are protected, and any decree fixing the boundary . . . must so provide." (App. 249a.)

On numerous other occasions before this Court, Delaware conceded that the 1905 Compact protected riparian

rights on the New Jersey side of the Delaware River. (*E.g.*, App. 215a ("[T]he State of Delaware has never questioned the right of citizens of New Jersey to wharf out to navigable water nor can such a right be questioned because it is clearly protected by the Compact of 1905 between the States."); App. 235a ("The effect of Article VII of the Compact . . . was that the State of Delaware recognized the rights of the inhabitants on the east side of the river to wharf out to navigable water. This right had never been questioned and was undoubtedly inserted to put beyond question the *riparian rights* (as distinguished from *title*) of land owners in New Jersey.") (emphasis in original).)

Indeed, Delaware *reassured* the Court that setting the boundary on the New Jersey side within the Twelve-Mile Circle would not interfere with New Jersey's riparian improvements because the 1905 Compact prevented such interference:

> Much is said by the Plaintiff . . . of the great value of these wharf rights on the New Jersey side. The implication in the brief is that if the boundary line between the States is determined to be low-water mark on the New Jersey shore the interests of the riparian owners will be either destroyed or seriously prejudiced. *This, of course, is simply not the fact. The Compact of 1905 above referred to recognized the rights of riparian owners in the river to wharf out, and the Master so found.* (App. 223a (emphasis added).)

And when New Jersey argued (albeit unsuccessfully) that the 1905 Compact already had set the boundary in the middle of the river by giving New Jersey the right to grant riparian

lands below the low-water mark, Delaware responded as follows:

> Even if the Compact of 1905 be construed as ceding to the State of New Jersey *the right to determine* to whom riparian rights (i.e., wharf rights appurtenant to riparian lands) shall be granted, it would still not affect the boundary between the States in any conceivable way. (App. 237a (emphasis in original).)

In short, Delaware conceded that the 1905 Compact both protected the right of New Jersey citizens to wharf out to navigable water and ceded to New Jersey the jurisdiction to regulate the exercise of such rights.

2. The Plain and Unambiguous Language of the 1905 Compact is Reinforced by the States' Construction of the Compact.

The contemporaneous construction by New Jersey and Delaware of each State's riparian jurisdiction under the 1905 Compact confirms that New Jersey retained exclusive riparian jurisdiction on its side of the Delaware River.

Following the enactment of the 1905 Compact, New Jersey continued to exercise its riparian jurisdiction over activities on the New Jersey side of the Delaware River within the Twelve-Mile Circle. Since 1905, New Jersey has issued at least thirty-three riparian grants extending below low-water within the Twelve-Mile Circle. (Castagna Aff. ¶ 8, App. 29a, 36a-51a, 54a.) In addition, New Jersey has exercised its riparian jurisdiction by applying regulatory and permitting requirements to various improvements and activities outshore of the low-water line in the Twelve-Mile

Circle, including dredging, pier construction, stormwater and wastewater discharge pipes, and water diversion. (*See* Reading Aff. ¶¶ 9-13, App. 58a-60a; Sickels Aff. ¶¶ 7-9, App. 63a-64a; Broderick Aff. ¶¶ 11-16, App. 70a-72a.)

In addition, New Jersey's courts, beginning nearly 50 years ago, affirmed New Jersey's right under the 1905 Compact to regulate activities occurring on riparian structures and to tax the value of such improvements, notwithstanding the 1934 boundary decision. *See New Jersey v. Federanko*, 139 A.2d 30, 36-37 (N.J. 1958) (affirming conviction for gambling that occurred on the Pennsgrove Pier);[14] *Main Assocs. Inc. v. B&R Enters., Inc.*, 181 A.2d 541, 543-45 (N.J. Super. Ct. Ch. Div. 1962) (upholding authority of Borough of Penns Grove to tax the value of the pier).

Thus, New Jersey's "contemporaneous reading" of the 1905 Compact and conduct following its enactment confirm that Article VII protected New Jersey's right to regulate riparian uses on its side of the River within the Twelve-Mile Circle, free from regulation by Delaware. *See Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 466 (1986) ("The agencies' contemporaneous reading of the statute lends strong support to our interpretation.").

Over the same period, Delaware's construction of the 1905 Compact "has been neither contemporaneous with its enactment nor consistent since the statute came into law." *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 257 (1991). In 1957, Delaware ceased an attempt to assert authority over a

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[14] In *Federanko*, Delaware submitted a brief adopting New Jersey's position that the 1905 Compact remained in effect after this Court's decision in *New Jersey v. Delaware II*. 139 A.2d at 33.

private outflow pipe on the New Jersey side of the River when the private landowner – E.I. DuPont de Numours & Co. ("DuPont") – protested that Delaware lacked jurisdiction under the 1905 Compact. (*See* Donlon Aff. ¶¶ 7-8 & Ex. C-G, App. 87a-89a, 102a-110a.) Indeed, the Delaware State Highway Department's legal counsel advised that Delaware had no jurisdiction over improvements appurtenant to the New Jersey side of the River within the Twelve-Mile Circle:

> I concur in [DuPont's] opinion that, pursuant to the terms of the Treaty of 1905 and the United States Supreme Court decision of 1933 [sic], the State of New Jersey is the proper authority with which the DuPont Company should deal in connection with any lands lying under the Delaware River within the boundary of the State of Delaware, but on the New Jersey side of the river and within the twelve-mile circle. (*Id.* ¶ 8(b) & Ex. E, App. 88a, 107a.)

Acting on that advice, the Delaware State Highway Department adopted a resolution on December 17, 1957, affirming that the Department "has no jurisdiction" over projects on the New Jersey side of the River within the Twelve-Mile Circle. (*Id.* ¶ 8(c) & Ex. G, App. 88a-89a, 109a-110a.) Delaware notified the United States Army Corps of Engineers accordingly by letter dated December 13, 1957. (*Id.* ¶ 8(d) & Ex. F, App. 89a, 108a.)

DuPont renewed its protests of Delaware's riparian jurisdiction in 1971, when Delaware sought to charge lease fees to DuPont for the construction of a bulkhead, pier, and fuel oil storage tank appurtenant to the New Jersey shoreline on riparian land previously granted to DuPont by the State of

New Jersey. (*Id.* ¶¶ 9-11 & Ex. H-J, App. 89a-91a, 111a-125a.) In the face of DuPont's invocation of the Compact, Delaware agreed to defer requiring any lease payments until such time as a federal court of competent jurisdiction resolved whether DuPont held superior title to Delaware. (*Id.* ¶ 11 & Ex. J, App. 91a, 121a.) The issue arose again in 1981, at which time DuPont again protested Delaware's jurisdiction based on the 1905 Compact and declined to make lease payments. (*Id.* ¶ 13 & Ex. L, App. 91a-92a, 128a-130a.) Although New Jersey has not been a party to that continuing controversy, it appears that the lease dispute remains unresolved.

Notwithstanding Delaware's enactment of the DCZA in 1971 and the DSLA in 1986, Delaware has issued permits to only a limited number of users on the New Jersey side, and it did not actually block a project until 2005. *See supra* at 11-15. Thus, the States' construction of the 1905 Compact reinforces the conclusion that the Compact protects New Jersey's right to regulate riparian uses on its side of the River within the Twelve-Mile Circle, free from regulation by Delaware.

III.

IT IS UNNECESSARY TO APPOINT A SPECIAL MASTER.

The Court should decide this case without appointing a special master. This controversy requires simply a legal ruling on the proper construction of the Compact of 1905. This ruling need only recognize that Article VII of the Compact unambiguously gives New Jersey exclusive authority over riparian improvements on its side of the River, as Delaware conceded here in the 1930s. Further, this Court

recently decided a similar legal issue in *Virginia v. Maryland*, 540 U.S. 56, so the legal guideposts are clear. Accordingly, the Court can and should decide this case without appointing a special master. *See, e.g., California ex rel. State Lands Comm'r v. United States*, 457 U.S. 273, 278 (1982) (No. 89, Orig.) ("No essential facts being in dispute, a special master was not appointed and the case was briefed and argued."); *New Hampshire v. Maine*, 532 U.S. 742, 756 (2001) (No. 130, Orig.) (deciding case without appointing a special master by applying judicial estoppel based on New Hampshire's position in the 1970s in No. 64, Orig.).

One last procedural issue warrants comment. As stated above, New Jersey believes it has proceeded properly by filing a motion to reopen in order to seek a supplemental decree pursuant to the Court's continuing jurisdiction retained in paragraph 5 of the 1935 Decree. However, if the Court were to determine that New Jersey instead should have filed a new Bill of Complaint, then New Jersey respectfully requests that the Court treat the Petition for Supplemental Decree as New Jersey's Bill of Complaint and allow New Jersey to proceed on the basis of the papers filed here.

CONCLUSION

New Jersey requests that the Court grant it leave to reopen No. 11, Original, to seek a supplemental decree. New Jersey's proposed Supplemental Decree is found at App. 269a.

The Court should direct Delaware to file its brief in opposition to New Jersey's petition for a supplemental decree, allow New Jersey to file a reply, and set the case for argument in the October 2005 Term.

The Court should then declare that Article VII of the Compact of 1905 grants New Jersey riparian jurisdiction to regulate the construction of improvements appurtenant to the New Jersey shore of the Delaware River within the Twelve-Mile Circle, free of regulation by Delaware, and the Court should enjoin Delaware from interfering with the exercise of New Jersey's riparian jurisdiction.

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July 28, 2005

APPENDIX

APPENDIX 1 — THE COMPACT OF 1905, ACT OF JANUARY 24, 1907, CH. 394, 34 STAT. 858 (1907)

CHAP. 394.—An Act Giving the consent of Congress to an agreement or compact entered into between the State of New Jersey and the State of Delaware respecting the territorial limits and jurisdiction of said States.

Whereas commissioners duly appointed on the part of the State of New Jersey and commissioners duly appointed on the part of the State of Delaware, for the purpose of agreeing upon and settling the jurisdiction and territorial limits of the two States, have executed certain articles, which are contained in the words following, namely:

"First. Whereas a controversy hath heretofore existed between the States of New Jersey and Delaware relative to the jurisdiction of such portion of the Delaware River as is included within the circle of twelve-mile radius, an arc of which constitutes the northern boundary of the State of Delaware, and it is the mutual desire of said States to so settle and determine such controversy as to prevent future complications arising therefrom; and

"Whereas there is now pending in the Supreme Court of the United States a cause wherein the said State of New Jersey is the complainant and the said State of Delaware is the defendant, in which cause an injunction has been issued against the State of Delaware restraining the execution of certain statutes of the State of Delaware relating to fisheries in said river, which said litigation hath been pending for twenty-seven years and upward; and

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"Whereas for the purpose of adjusting the differences between the said two States arising out of said conflict of jurisdiction, Edward C. Stokes, Robert H. McCarter, Franklin Murphy, and Chauncey G. Parker have been appointed commissioners on the part of the State of New Jersey by joint resolution of the legislature of said State, and Preston Lea, Robert H. Richards, Herbert H. Ward, and George H. Bates have been appointed commissioners on the part of the State of Delaware by joint resolution of the general assembly of said State, to frame a compact or agreement between the said States and legislation consequent thereon, to be submitted to the legislatures of said two States for action thereon, looking to the amicable termination of said suit between said States now pending in the Supreme Court of the United States, and the final adjustment of all controversies relating to the boundary line between said States, and to their respective rights in the Delaware River and Bay: Now therefore,

"The said State of New Jersey, by its commissioners above named, and the said State of Delaware, by its commissioners above named, do hereby make and enter into a compact or agreement between said States as follows:

"ARTICLE I. Criminal process issued under the authority of the State of New Jersey against any person accused of an offense committed upon the soil of said State, or upon the eastern half of said Delaware River, or committed on board of any vessel being under the exclusive jurisdiction of that State, and also civil process issued under the authority of the State of New Jersey against any person domiciled in that State, or against property taken out of that State to evade the

laws thereof, may he served upon any portion of the Delaware River between said States from low-water mark on the New Jersey shore to low-water mark on the Delaware shore, except upon Reedy and Pea Patch islands, unless said person or property shall be on board a vessel aground upon or fastened to the shore of the State of Delaware, or the shores of said islands, or fastened to a wharf adjoining thereto, or unless such person shall be under arrest or such property shall be under seizure by virtue of process or authority of the State of Delaware.

"ART. II. Criminal process issued under the authority of the State of Delaware against any person accused of an offense committed upon the soil of said State, or upon the western half of said Delaware River, or committed on board of any vessel being under the exclusive jurisdiction of that State, and also civil process issued under the authority of the State of Delaware against any person domiciled in that State, or against property taken out of that State to evade the laws thereof, may be served upon any portion of the Delaware River between said States from low-water mark on the Delaware shore to low-water mark on the New Jersey shore, unless said person or property shall be on hoard a vessel aground upon or fastened to the shore of the State of New Jersey, or fastened to a wharf adjoining thereto, or unless such person shall be under arrest or such property shall be under seizure by virtue of process or authority of the State of New Jersey.

"ART. III. The inhabitants of the said States of Delaware and New Jersey shall have and enjoy a common right of fishery throughout, in, and over the waters of said river

between low-water marks on each side of said river between the said States, except so far as either State may have heretofore granted valid and subsisting private rights of fishery.

"ART. IV. Immediately upon the execution hereof the legislature of the State of New Jersey shall appoint three commissioners to confer with three commissioners to be immediately appointed by the general assembly of the State of Delaware for the purpose of drafting uniform laws to regulate the catching and taking of fish in the Delaware River and Bay between said two States, which said commissioners for each State, respectively, shall, within two years from the date of their appointment, report to the legislature of each of said States the proposed laws so framed and recommended by said joint commission. Upon the adoption and passage of said laws so recommended by the respective legislatures of said two States said laws shall constitute the sole laws for the regulation of the taking and catching of fish in the said river and bay between said States. Said laws shall remain in force until altered, amended, or repealed by concurrent legislation of the said two States. Said commissioners shall also ascertain the dividing line between said river and bay, and upon each of the shores of said two States where said dividing line extended shall intersect the same, shall, at the joint expense of said States, erect a suitable monument to mark the said dividing line. Said dividing line between said monuments shall be the division line between the said river and bay for the interpretation of and for all purposes of this compact, and of the concurrent legislation provided for therein.

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"The faith of the said contracting States is hereby pledged to the enactment of said laws so recommended by said commissioners, or to such concurrent legislation as may seem judicious and proper in the premises to the respective legislatures thereof.

"Each State shall have and exercise exclusive jurisdiction within said river to arrest, try, and punish its own inhabitants for violation of the concurrent legislation relating to fishery herein provided for.

"ART. V. All laws of said States relating to the regulation of fisheries in the Delaware River not inconsistent with the right of common fishery hereinabove mentioned shall continue in force in said respective States until the enactment of said concurrent legislation as herein provided.

"ART. VI. Nothing herein contained shall affect the planting, catching, or taking of oysters, clams, or other shell fish, or interfere with the oyster industry as now or hereafter carried on under the laws of either State.

"ART. VII. Each State may, on its own side of the river, continue to exercise riparian jurisdiction of every kind and nature, and to make grants, leases, and conveyances of riparian lands and rights under the laws of the respective States.

"ART. VIII. Nothing herein contained shall affect the territorial limits, rights, or jurisdiction of either State of, in, or over the Delaware River, or the ownership of the subaqueous soil thereof, except as herein expressly set forth.

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"ART. IX. This agreement shall be executed by the said commissioners when authorized to do so by the legislatures of the said States. It shall thereupon be submitted to Congress for its consent and approval. Upon the ratification thereof by Congress it shall be and become binding in perpetuity upon both of said States; and thereupon the suit now pending in the Supreme Court of the United States, in which the State of New Jersey is complainant and the State of Delaware is defendant, shall be discontinued without costs to either party and without prejudice. Pending the ratification hereof by Congress said suit shall remain in statu quo.

"Done in two parts (one of which is retained by the commissioners of Delaware, to be delivered to the governor of that State, and the other one of which is retained by the commissioners of New Jersey, to be delivered to the governor of that State) this twenty-first day of March, in the year of our Lord one thousand nine hundred and five."

EDWARD C. STOKES,	PRESTON LEA,
ROBERT H. MCCARTER,	ROBERT H. RICHARDS,
FRANKLIN MURPHY,	HERBERT H. WARD,
CHAUNCEY G. PARKER,	GEO. H. BATES.

And whereas the said agreement has been confirmed by the legislatures of the said States of New Jersey and Delaware, respectively: Therefore

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent of the Congress of the United States is hereby given to the said agreement and to each and every part and

article thereof: *Provided,* That nothing therein contained shall be construed to impair or in any manner affect any right or jurisdiction of the United States in and over the islands or waters which form the subject of the said agreement.

Approved, January 24, 1907.

APPENDIX 2 — DECREE, *STATE OF NEW JERSEY v. STATE OF DELAWARE*, ORIGINAL NO. 11, JUNE 3, 1935

Decree

NEW JERSEY *v.* DELAWARE.

No. 11, original.

Decided February 5, 1934 (291 U.S. 361) -
Decree entered June 3, 1935.

DECREE

This cause came on to be heard upon the pleadings, evidence, and the exceptions filed by the parties to the report of the Special Master, and was argued by counsel. The Court now being fully advised in the premises and for the purpose of carrying into effect the conclusions set forth in the opinion of this Court, announced February 5, 1934 (291 U.S. 361);

It is now ORDERED, ADJUDGED, AND DECREED as follows:

1. The report of the Special Master filed in this cause is hereby approved, and all exceptions thereto are hereby overruled.

2. Within the twelve mile circle (that is, within the circle the radius of which is twelve miles, and the center of which is the building used prior to 1881 as the courthouse at

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New Castle, Delaware, certain arcs of which are hereafter described and determined), the Delaware River and the subaqueous soil thereof up to mean low water line on the easterly or New Jersey side is adjudged to belong to the State of Delaware, and the true boundary line between the States within said twelve mile circle is adjudged to be mean low water mark on the easterly or New Jersey side of the Delaware River.

3. Below said twelve mile circle the true boundary line between the states of New Jersey and Delaware is adjudged to be the middle of the main ship channel in Delaware River and Bay.

4. The real, certain, and true boundary line separating the States of New Jersey and Delaware, in Delaware River and Bay thus determined is shown upon the annexed composite map, made up of parts of charts Nos. 294 and 295 (published in September, 1933), and No. 1218 (published in August, 1932), of the United States Coast and Geodetic Survey, embracing the particular locality; said composite map is identified by title and date as follows:

"Map of New Jersey—Delaware Boundary in
Delaware River and Delaware Bay
To Accompany
The Decree of the Supreme Court of the United States
Being a composite map combining and reducing U.S.C. &
G.S. Charts 294, 295 (Sept. 1933) and 1218 (Aug. 1932)
to show boundary between New Jersey and Delaware

settled by the final decree of the Supreme Court of the United States—pursuant to the opinion of the Court reported in 291 U.S. 361.

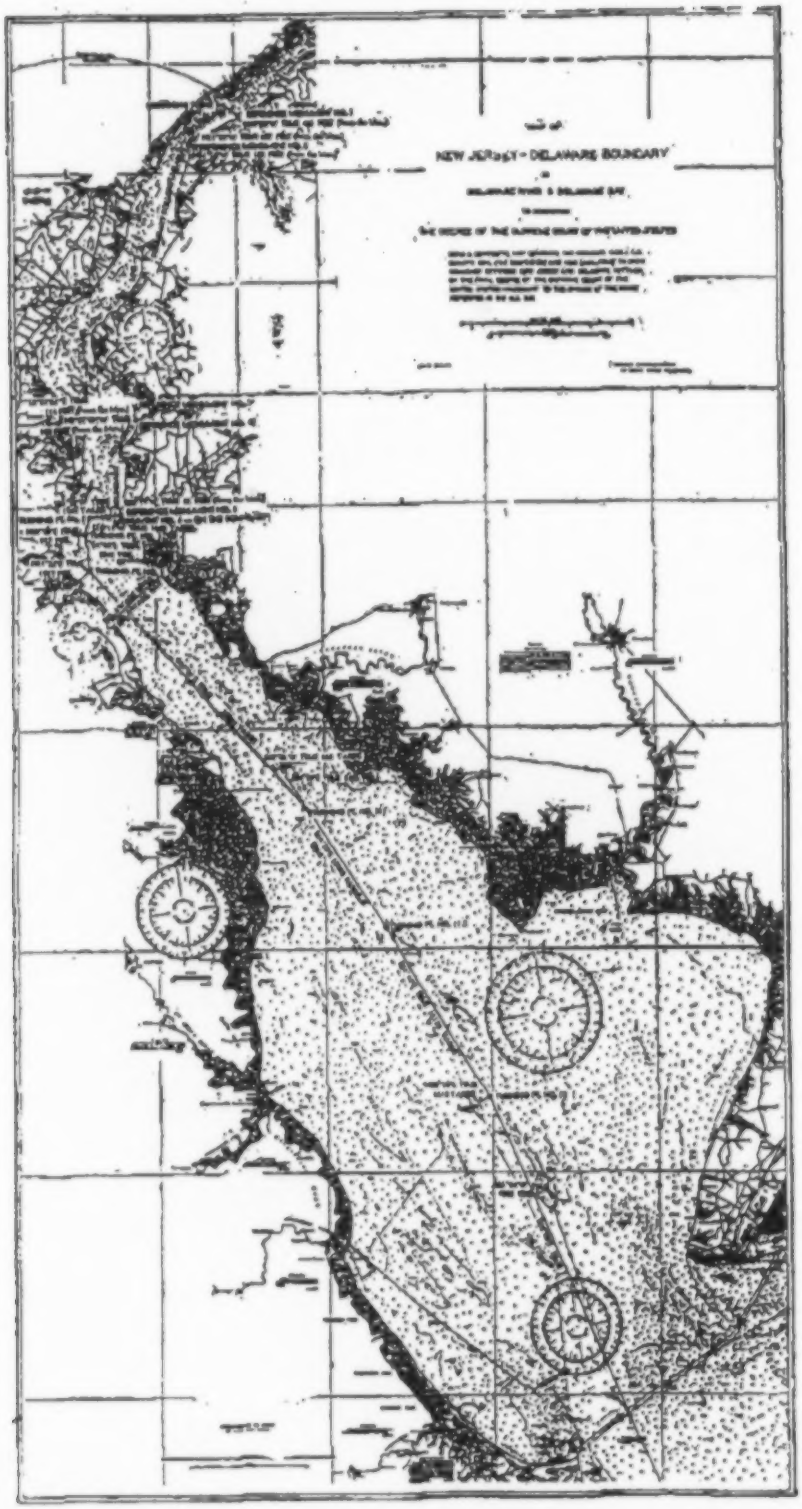
(Scale)

March 30, 1935

Sherman & Sleeper, Engineers
501 Cooper Street, Camden, N. J."

Appendix 2

[FOLD OUT]



Appendix 2

Said boundary line is described as follows:

BEGINNING at a point in the middle of the main ship channel of the Delaware River in the extension southeastward of the Eastern Arc of the Compound Curve of the boundary between Delaware and Pennsylvania, as surveyed by W.C. Hodgkins of the United States Coast and Geodetic Survey and set forth in Appendix No. 8 of the Survey Report for 1893; said point being a corner between Pennsylvania and New Jersey.

Thence (1) southeastward along said arc extended to the mean low water line on the eastern bank of the Delaware River, which point is N. 49° 50' W. True, 460 feet from Boundary Reference Monument No. 1 the position of which is Lat. 39° 47' 43.211", Long. 75° 24' 16.047".

Thence (2) along the mean low water line of the eastern bank of the Delaware River the several courses and distances thereof, the general direction being southwestward, crossing in a straight line the mouth of each intervening small estuary, to a point on the end of the spit extending southwestward from the fast land of Oldman's Neck, on the northwestern side of the mouth of Oldman's Creek; said point is located N. 51° 38' W. True, 637 feet from Boundary Reference Monument No. 2 the position of which is Lat 39° 46' 23.552", Long. 75° 26' 49.560".

Thence (3) southwestward in a straight line across the mouth of Oldman's Creek to a point on the mean low water line located N. 51° 38' W. True, 183 feet from Boundary Reference Monument No. 2.

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Thence (4) along the mean low water line of the eastern bank of the Delaware River, the several courses and distances thereof, the general direction being first southwestward, then southeastward, crossing in a straight line the mouth of each intervening small estuary, to a point located S. 3° 57' 55" E. True, 116 feet from Boundary Reference Monument No. 3 (which monument is United States Coast and Geodetic Survey Triangulation Station SALEM COVE NORTH) the position of which is Lat. 39° 34' 40.915", Long. 75° 30' 46.942".

Thence (5) southward in a straight line across the mouth of the Salem river to a point on the mean low water line of the eastern bank of the Delaware river located N. 3° 57' 53" W. True, 108 feet from Boundary Reference Monument No. 4 (which monument is United States Coast and Geodetic Survey Triangulation Station SALEM COVE SOUTH) the position of which is Lat. 39° 34' 03.753", Long. 75° 30' 43.614".

Thence (6) along the mean low water line of the eastern bank of the Delaware River, the several courses and distances thereof, the general direction being first, southwestward, second, southeastward, and, lastly, southward, crossing in a straight line the mouth of each intervening small estuary, to a point located S. 80° 19' W. True, 55 feet from Boundary Reference Monument No. 5 the position of which is Lat. 39° 29' 52.718", Long. 75° 31' 41.555".

Thence (7) westward along the arc of a circle, the radius of which is 18,216.16 meters or 59,764.2 feet and the center of which is the building used prior to 1881 as the County

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Courthouse at New Castle, Delaware, across Artificial Island, passing through Boundary Monument No. 6 on Artificial Island the position of which is Lat. 39° 29' 47.255", Long. 75° 32' 33.640"; and continuing westward along the same arc extended to Turning Point No. 7 in the middle of the main ship channel of the Delaware River said Turning Point No. 7 being located S. 86° 30' W. True, 1,567 yards from said Boundary Monument No. 6.

Thence (8) in a straight line S. 15° 11' W. True, 1,603 yards to Turning Point No. 8 located N. 89° 07' E. True, 997 yards from Reedy Island Jetty Middle Light.

Thence (9) in a straight line S. 4° 56' E. True, 3,341 yards to Turning Point No. 9 located N. 51° 33' E. True, 1,937 yards from Reedy Island Front Range Light.

Thence (10) in a straight line S. 42° 01' E. True, 30,208 yards going from the Delaware River into Delaware Bay, and passing through a point located S. 48° 06' W. True, 668 yards from Ship John Shoal Light, to Turning Point No. 10 located S. 34° 24' E. True, 5,106 yards from Ship John Shoal Light and in a straight line between Ship John Shoal Light and Elbow of Cross Ledge Light.

Thence (11) in a straight line S. 34° 22' E. True, 12,995 yards to Elbow of Cross Ledge Light, being Turning Point No. 11.

Thence (12) in a straight line S. 31° 44' E. True, along a straight line between Elbow of Cross Ledge Light and Brandywine Shoal Light, 18,124 yards to Turning Point

No. 12 located N. 58° 16' E. True 1,612 yards from Fourteen Foot Bank Light.

Thence (13) in a straight line S. 24° 06' E. True, be the distance more or less, through Delaware Bay and seaward to the limits of the respective states of New Jersey and Delaware in the Atlantic Ocean, said course passing through a point located S. 65° 54' W. True, 1,303 yards from Brandywine Shoal Light.

In the foregoing description the courses or bearings refer to the true meridian passing through the beginning of each course; the positions of the monuments are given on the North American Datum 1927; the names of lights and ranges are those given in the Light Lists, Atlantic and Gulf Coasts of the United States, corrected to January 15, 1934, and published by the Bureau of Lighthouses, with the exception of Reedy Island Jetty Middle Light which was not established until about July 12, 1934; the position of the lights in 1934 is used in computing the turning points of the various courses of the boundary and as reference points for these turning points and tie lines to the courses.

5. The court retains jurisdiction of this cause for the purpose of any order or direction, or modification of this decree, or any supplemental decree, which it may at any time deem to be proper in order to carry into effect any of the provisions of this decree, and for the purpose of a resurvey of said boundary line in case of physical changes in the mean low water line within said circle, or in the middle of the main ship channel below said circle, which may, under established rules of law, alter the location of such boundary line.

6. The State of Delaware, its officers, agents, and representatives, its citizens and all other persons, are perpetually enjoined from disputing the sovereignty, jurisdiction, and dominion of the State of New Jersey over the territory adjudged to the State of New Jersey by this decree; and the State of New Jersey, its officers, agents, and representatives, its citizens and all other persons are perpetually enjoined from disputing the sovereignty, jurisdiction, and dominion of the State of Delaware over the territory adjudged to the State of Delaware by this decree.

7. This decree is made without prejudice to the rights of either state, or the rights of those claiming under either of said states, by virtue of the compact of 1905 between said states (*34 Stat. L. Pt. 1, Ch. 394, p. 858*).

8. The costs of this suit shall be equally divided between the parties.

APPENDIX 3 — LETTER OF PAUL T. FADER, CHIEF COUNSEL TO ACTING GOVERNOR OF NEW JERSEY, RICHARD J. CODEY, TO JOSEPH SCHOELL, LEGAL COUNSEL TO GOVERNOR OF DELAWARE, RUTH ANN MINNER, DATED APRIL 11, 2005

STATE OF NEW JERSEY
OFFICE OF THE GOVERNOR
PO Box 001
TRENTON NJ 08625-0001

RICHARD J. CODEY
Acting Governor

PAUL T. FADER
Chief Counsel

April 11, 2005

Joseph Schoell, Esq.
Legal Counsel to the Governor
Office of the Governor
820 North French Street, 12th Floor
Wilmington, Delaware 19801

Dear Mr. Schoell:

I am writing as a follow up to our meeting on March 29, 2005 in which we discussed the application of Crown Landing LLC ("Crown Landing") before the Delaware Department of Natural Resource and Environmental Control ("DNREC"). As I explained to you in our meeting and in a prior telephone call in early March, it is the position of the State of New Jersey that pursuant to the 1905 Compact between New Jersey and Delaware, Delaware does not have

jurisdiction over the construction of this project or any project appurtenant to New Jersey's shoreline.

On February 3, 2005 DNREC rendered a decision denying the application of Crown Landing to build a 2,000-foot pier on the Delaware River in Logan Township, Gloucester County, New Jersey. The pier is a key component of a proposed Liquefied Natural Gas ("LNG") import facility and regasification plant in Logan Township. This project will bring significant energy, environmental and economic benefits to the New Jersey—Delaware Region.

In rendering its decision, DNREC relied on the provisions of the Delaware Coastal Zone Act. However, I am told that DNREC never addressed the New Jersey jurisdictional issue. Subsequent to the date of our meeting, the Delaware Coastal Zone Industrial Control Board rejected an appeal by Crown Landing to overturn the DNREC decision and once again the New Jersey jurisdictional issue was not addressed.

It is evident that Delaware does not have jurisdiction over the construction of the pier or any other part of this project. Under the Interstate Compact of 1905 between New Jersey and Delaware "each State may, on its own side of the river, continue to exercise riparian jurisdiction of every kind and nature." This includes each state's right to exert regulatory control over structures built on its own side of the river as well as tidelands ownership rights. New Jersey's riparian jurisdiction clearly applies to the pier, that is a part of the Crown Landing project.

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Article VII of the 1905 Compact grants New Jersey, as a State, a riparian right to use the Delaware River and to regulate use of the River from the New Jersey shore within the 12-mile circle. That right was not affected by the 1934 boundary award, as the Supreme Court specifically stated that the boundary line determination within the 12-mile circle was "subject to the Compact of 1905." *New Jersey v. Delaware*, 291 U.S. 361, 384 (1934).

Most recently, in the 2003 U.S. Supreme Court decision, *Virginia v. Maryland*, 124 S.Ct. 598, the court affirmed Virginia's rights in a similar situation. In *Virginia v. Maryland*, the Supreme Court held that the Compact of 1785 between Virginia and Maryland prohibits Maryland from attempting to regulate the use of the Potomac River by Virginia or her citizens. Even though the Virginia—Maryland boundary is on the Virginia shore of the Potomac River, the Court held that Virginia has the right to withdraw water from the Potomac and to build improvements in the river extending beyond the boundary line. The ruling was based on Article VII of the Compact of 1785. Based on this language the Supreme Court held that "Virginia, its governmental subdivisions, and its citizens may withdraw water from the Potomac River and construct improvements appurtenant to the Virginia shore of the Potomac River free of regulation by Maryland."

Our two states have always recognized the need to work together for regional solutions to common issues facing the area. Economic growth, environmental quality, and energy sufficiency are among the most important of these issues. Delaware should not think this history of cooperation may

in any way be perceived as New Jersey relinquishing any of its jurisdictional rights.

Please review the New Jersey – Delaware Compact of 1905, and particularly Article VII, under which New Jersey clearly has the right to exercise riparian jurisdiction over the proposed Crown Landing project. In addition, a review of the Maryland—Virginia compact and the U.S. Supreme Court opinion of 2003 will make it abundantly clear that Delaware is patently wrong in attempting to exert control over this project. I would hope that in view of these rights in addition to the common regional needs of New Jersey and Delaware in the important areas of economic growth, energy sufficiency, and enhanced environmental quality, Delaware would acknowledge New Jersey's proper jurisdiction. If not, New Jersey will be forced to take all appropriate action to enforce its rights. I await your prompt reply.

Very truly yours,

s/ Paul T. Fader
Paul T. Fader
Chief Counsel

cc: Governor Richard J. Codey
Attorney General Peter Harvey
Pete Cammarano, Chief of Staff

APPENDIX 4 — LETTER OF JOSEPH C. SCHOELL, LEGAL COUNSEL TO GOVERNOR OF DELAWARE, RUTH ANN MINNER, TO PAUL T. FADER, CHIEF COUNSEL TO ACTING GOVERNOR OF NEW JERSEY, RICHARD J. CODEY, DATED MAY 9, 2005

STATE OF DELAWARE
OFFICE OF THE GOVERNOR

RUTH ANN MINNER
GOVERNOR

May 9, 2005

Paul T. Fader, Esquire
Chef Counsel
Office of the Governor
P.O. Box 001
Trenton, NJ 08625-0001

Dear Paul:

Thank you for your April 11, 2005 letter regarding the State of Delaware's authority to regulate uses within its borders and Coastal Zone. We respectfully disagree with your conclusion that Delaware lacks regulatory authority over the proposed Crown Landing project, as well as 'any project appurtenant to New Jersey's shoreline.'"

Delaware's right to regulate structures appurtenant to the shore that extend into Delaware waters and riverbed was explicitly recognized by the United States Supreme Court in *New Jersey v. Delaware*, 291 U.S. 361, 375-76 (1934). The Supreme Court considered the issue of piers built by New

Jersey "riparian proprietors" that extended onto Delaware's portion of the riverbed. It ruled that Delaware's "acquiescence" in allowing such piers comprised a "privilege or license accorded [by Delaware] to the individual owners . . . bounded by the lines of their possession." By recognizing Delaware's grant of "privilege or license" to those specific New Jersey pier-owners, the Court settled any question as to Delaware's regulatory authority or ownership of the subaqueous soil.

While Article VII of the 1905 Compact preserved for both states "riparian jurisdiction," that term does not cover structures that cross state lines. Rather, the "riparian jurisdiction" addressed in the Compact pertains only to the river banks within each state's borders. This is obvious from the language of Article VII:

> Each State may, on its own side of the river, continue to exercise riparian jurisdiction of every kind and nature, and to make *grants, leases, and conveyances of riparian lands* and rights under the laws of the respective States.

As the reference to "grants, leases, and conveyances" shows, the jurisdiction addressed by this provision is that over "riparian lands" — i.e., shoreline within the state's boundaries — not riverbed territory. This is confirmed by the very next provision, Article VIII:

> Nothing herein contained shall affect the territorial limits, rights, or jurisdiction of either State *of, in, or over the Delaware River,* or the ownership of

> the subaqueous soil thereof, except as herein expressly set forth.

Reading these provisions together, the Compact preserved each state's jurisdiction over its own "riparian lands," but *carved out* regulatory rights "of, in, or over" the river or the ownership of subaqueous soil. Thus the Compact plainly cannot support New Jersey's claim of regulatory control over structures that cross into Delaware. Even if the Compact was ambiguous on this point, which it is not, such ambiguity was extinguished by the Supreme Court's later recognition of Delaware's authority over New Jersey piers and appurtenances *in New Jersey v. Delaware.*

In *Virginia v. Maryland,* 540 U.S. 56 (2003), the relevant documents — a 1785 Compact and an 1874 arbitration verdict — explicitly addressed the issue of cross-border improvements. Both documents expressly preserved full wharf and improvement rights for each state. The Court's ruling was founded upon a strict analysis of the "plain language" of the documents. *See id.,* 540 U.S. at 66, 69-71, 73-74. In contrast, the 1905 Compact explicitly preserved each state's right to regulate its own territory "of, in, or over the Delaware River."

We appreciate New Jersey's interest in this issue, and hope that you understand that jurisdictional issues are important to the citizens of the State of Delaware. It certainly is our hope that we will continue the spirit of cooperation that has been the hallmark of relations between our two states.

Very truly yours,

s/ Joseph C. Schoell
Joseph C. Schoell
Legal Counsel to the Governor

cc: Collins J. Seitz, Jr., Esquire
Kevin Maloney, Esquire

APPENDIX 5 — AFFIDAVIT OF RICHARD CASTAGNA, DATED JUNE 27, 2005

No. 11, Original

In The
Supreme Court of the United States

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF DELAWARE,

Defendant.

AFFIDAVIT OF RICHARD G. CASTAGNA IN SUPPORT OF MOTION TO REOPEN AND FOR A SUPPLEMENTAL DECREE

State of New Jersey:

SS

County of Mercer:

Richard G. Castagna, being duly sworn, deposes and says:

1. I am the Supervisor of the Southern Region of the Bureau of Tidelands Management of the New Jersey Department of Environmental Protection. I have held this position since 1993. For 16 years before that, I was consecutively a Senior

Environmental Specialist, a Principal Environmental Specialist and a Supervising Environmental Specialist. I have a total of 28 years experience in identifying State tidelands claims and in assisting in the administration of the tidelands program of the State of New Jersey. The Bureau of Tidelands serves as staff to the Tidelands Resource Council in the Department of Environmental Protection of the State of New Jersey. N.J. Stat. Ann. § 13:1B-10 (1979.) The Council has been designated by the Legislature as "the public body responsible for the stewardship of the State's riparian lands." N.J. Stat. Ann. § 12:3-12.1 (Supp. 2005.) Since 1869, the Council (and its predecessors) has been the agency initially responsible for determining whether the State should make any grant, lease or conveyance of State riparian lands and rights under the laws of New Jersey.

2. The staff of the Bureau is the custodian of the records of the actions of the Council and its predecessor agencies. In preparing this Affidavit, I have reviewed those records, the laws of New Jersey concerning legislative riparian grants, portions of the record compiled in *New Jersey v. Delaware*, 291 U.S. 361 (1934) ("the 1934 proceedings"), and the response of Delaware to the Division of Law's May 2005 Freedom of Information Act request concerning Riverwalk in Penns Grove.

Riparian Rights in New Jersey in 1905 and Today

3. Riparian rights in New Jersey have been delineated by statute. Riparian owners have no constitutional riparian rights. *Stevens v. Patterson and Newark Railroad Company*,

34 N.J.L. 532, 3 Am. Rep. 269 (E. & A. 1870.) Before 1851, the State of New Jersey recognized a "local custom" of riparian owners to fill the tidally flowed lands ("tidelands") outshore of their properties. *Bell v. Gough*, 23 N.J.L. 624 (E. & A. 1852.) Starting in 1851, this common law right was circumscribed by statute to allow such filling without state permission only from the mean high water line to the mean low water line. 1851 N.J. Laws p.335. ("The Wharf Act".) This statutory riparian right to fill to the low water line was abolished in the Hudson River area in 1869, 1869 N.J. Laws ch. 383, p.1018, § 3, and was abolished elsewhere in New Jersey in 1891. 1891 N.J. Laws ch. 124, p.216, § 1, codified as N.J. Stat. Ann. § 12:3-4 (1979.) State regulation of riparian lands in New Jersey began in 1851 with the adoption of the Wharf Act. From 1851 to 1891, riparian owners in New Jersey, under the Wharf Act, could construct piers and fill outshore of low water provided they obtained the approval of their respective counties. The counties could approve such structures or fill only if there was no hazard to navigation.

4. Riparian laws in New Jersey are compiled in N.J. Stat. Ann. §§ 12:3-1 (1979), et seq., first known as The General Riparian Act of 1869. Riparian owners have a preemptive right to apply to the State of New Jersey to lease or purchase the State's tidal land in front of their upland. N.J. Stat. Ann. § 12:3-7 (enacted in 1869.) A sale or lease to one who is not an upland owner must be with the consent of the upland owner or on six month's notice to the upland owner. N.J. Stat. Ann. § 12:3-9 (enacted 1869.) Otherwise, the grant or lease will be void. *Shamberg v. Board of Riparian Commissioners*, 43 N.J.L. 132, 60 A. 43 (Sup. Ct. 1905.) Since 1916, state or local governments planning parks or

highways have not needed the upland owner's prior consent: this is the lone exception to this consent requirement. N.J. Stat. Ann. § 12:3-33 (enacted in 1916.) If a right of way, such as a street or railroad line, separates a property owner from the shoreline, that owner nevertheless has the right of an upland owner or a riparian owner to apply for a state tidelands grant or lease. N.J. Stat. Ann. § 12:3-18 (enacted 1877.) Riparian owners, once they have a grant or lease, may dredge out from the area of their grant in order to reach the navigable channel. N.J. Stat. Ann. § 12:3-21 (enacted 1891.) The exercise of this right is subject to obtaining applicable State environmental permits and a tidelands license. Riparian owners also have a common law right to accretion to their properties and suffer loss of their lands by erosion. Artificial filling of State tidelands is prohibited without permission from the State and requires a conveyance or lease of the tidelands involved. N.J. Stat. Ann. § 12:3-4 (as amended in 1891.) Unauthorized filling does not divest the State of its title. N.J. Stat. Ann. § 12:3-4 (enacted 1877.)

5. Such in general were the riparian rights of property owners in New Jersey in 1905, or shortly thereafter, rights which continue to be in effect to the present day.

Actions of the State of New Jersey Asserting Its Riparian Jurisdiction Over the Lands of the Delaware River Within the Twelve Mile Circle

6. The State of New Jersey, first through its Legislature and its Governors, and then after 1871 through the Council and its predecessors, has approved numerous conveyances and leases of riparian lands extending waterward from the present

or former mean high water line beyond the low water mark of the Delaware River within the Twelve Mile Circle defined in *New Jersey v. Delaware*, 295 U.S. 694 (1935) (decree.) Indeed, a pier or dock must extend a sufficient distance beyond the low water mark in order that vessels at low tide can freely traverse between the channel and the landing. Without such access, riparian rights would be largely illusory.

7. Typically, the Council's actions anticipated the construction of piers and were, for the period 1914 to approximately 1978, accompanied by the State's regulatory authorization to build the structures, or by permits issued to legalize structures already in place.

Henry J. Sherman, a Consulting Engineer with the Board of Commerce and Navigation, one of the predecessor agencies to the present Council, described this permitting authority in his testimony before the Special Master in the 1934 proceedings. (Stip. Rec. at 85.)[1]

From 1978 to the present, the Council conditioned its approval of a grant, license or easement on the applicant's obtaining a New Jersey regulatory permit, together with all other required federal, New Jersey and local regulatory permits.

8. On at least eight occasions between 1854 and 1905, the State of New Jersey exercised its riparian jurisdiction by approving State tidelands conveyances beyond the low water

1. *New Jersey v. Delaware*, No. 11, Orig., Volume 1, Stipulated Record Testimony, United States National Archives & Records Admin., Record Group 267, Box 155, location: 17E4/06/23/05 - 24/01.

line within the Twelve Mile Circle. I further found 33 instances between 1905 and the present in which the State of New Jersey continued to exercise its riparian jurisdiction on the New Jersey side of the River within the Twelve-Mile Circle. These actions from 1854 to the present involved 48 separate tracts of land that were granted, leased or licensed by the State to private or governmental entities. Consistent with New Jersey's conveyances before 1905 and with the provisions of the Compact of 1905, the State of New Jersey, acting through the Board of Riparian Commissioners and its successors, approved and delivered each of these State tidelands grants and leases without limiting the grant or conveyance to the low water line. The Board of Riparian Commissioners and its successors typically relied on previously established or then modified pierhead and bulkhead lines as the presumptive limit to which the grantees could extend their riparian structures. The pierhead lines established in 1877 and in 1916 in this area were located well beyond the mean low water line.

Actions of the State of New Jersey Asserting its Riparian Jurisdiction Over the Lands of the Delaware River in the Twelve Mile Circle Before the Compact of 1905.

A map depicting the grants identified below is annexed as an exhibit to this affidavit. The numbers on the map correspond to the following numbered paragraphs. In all of the riparian grants listed, the State granted riparian rights extending beyond the mean low water line.

Appendix 5

(1) 1854 N.J. Laws ch. 143, p.375. This Act authorized Thomas D. Broadway, et al., to build and maintain docks, piers or wharves in front of their lands at Pennsville in the Township of Lower Penns Neck, Salem County.[2] (Record, No. 11, Orig., Pl. Exs. 41, 131.)[3] The Act provided that Broadway was authorized to extend these structures into the Delaware River "a sufficient distance for the accommodation of vessels navigating" the River, but not "so far into the said river as to injure or impede the navigation of the same." 1854 N.J. Laws ch. 143, p.375, § 1. This pier was at the foot of Main Street in Pennsville. It was included within the 1923 State grant to William D. Acton. (Record, No. 11, Orig., Pl. Exs. 3, 57 (Grant "P").)

Mr. Sherman testified during the 1934 proceedings that at that time a wharf existed at this location, owned by the Wilson Line. (Stip. Rec. at 279-80.)

(2) 1855 N.J. Laws ch. 109, p.274. This Act incorporated the Pennsgrove Pier Company and authorized it to build and maintain "a wharf or pier extending from the mainland into the river Delaware at the Village of Pennsgrove," Salem County.[4] The Act authorized the Company to enlarge, extend

2. Lower Penns Neck Township is now called Pennsville Township.

3. References to "Record, No. 11, Orig., Pl. Ex." are citations to exhibits admitted into evidence in the 1934 proceedings. *See New Jersey v. Delaware*, No. 11, Orig., Volumes 3-13, United States National Archives & Records Admin., Record Group 267, Boxes 156-165, location: 17E4/06/23/05 - 24/01

4. The Village of Pennsgrove is now called Penns Grove Borough.

and rebuild the pier and to "purchase, lease and hold such and so much land as is necessary for that purpose." (*Id.*, § 4; *see also* Record, No. 11, Orig., Pl. Exs. 42, 132.) This pier was at the foot of Main Street in Penns Grove. It was included within the 1916 State grant to the Pennsgrove Pier Company. (Record, No. 11, Orig., Pl. Exs. 3, 57 (Grant "B").)

Mr. Sherman testified in the 1934 proceedings about the pier on this property. (Stip. Rec. at 281.)

This pier was also the site of the gambling offense over which the State of New Jersey's jurisdiction was upheld in *New Jersey v. Federanko*, 29 N.J. 119, 139 A.2d. 30 (1958.)

This pier is identified on the tax map of the Borough of Penns Grove as Block 57, Lot 6. It is substantially outshore of the mean low water line, and it is taxed by Penns Grove.

(3) 1870 N.J. Laws ch. 131, p.346. This Act authorized Robert Walker, et al., to build wharves, piers and bulkheads in front of their lands in the Township of Upper Penns Neck.[5] (Record, No. 11, Orig., Pl. Exs. 48, 135.) The Act permitted the pier to extend up to 400 feet from the high water mark into the River, but not in the front of the land of any other person.

(4) 1870 N.J. Laws ch. 344, p.726. This Act authorized Joseph Guest to build and maintain a dock or wharf in front of his lands in the Township of Upper Penns Neck. The Act authorized Guest to extend the dock or wharf "a sufficient

5. Upper Penns Neck Township is now called Carneys Point Township.

distance into the Delaware River for the accommodation of vessels navigating the same, and from time to time to rebuild and repair the same." This wharf once extended 100 feet outshore of the high water line. (Record, No. 11, Orig., Pl. Exs. 44, 134.)

(5) 1871 N.J. Laws ch. 307, p.758. This Act authorized Henry Barber to build wharves, piers and bulkheads in front of his lands in the Township of Upper Penns Neck. (Record, No. 11, Orig., Pl. Ex. 43.) The Act allowed Barber to extend his pier up to 100 feet below the low water mark into the River. (*Id.*) The wharf was located at the foot of West Harmony Street, and was known as Barber's Wharf. A sketch in 1931 showed that it extended 430 feet outshore of the low water line, not the 100 feet called for in the statute. (*Id.* Ex. 133.) Mr. Sherman testified in the 1934 proceedings that the Barber Wharf once extended 400 feet outshore of the low water line. (Stip. Rec. at 282.)

(6) In 1871, the State of New Jersey expanded the authority of the Board of Riparian Commissioners to the lands under the tidal waters of the entire State, including the submerged tidal lands of the Delaware River in the area of the Twelve Mile Circle. 1871 N.J. Laws ch. 256, p.44, § 1, now codified as N.J. Stat. Ann. § 12:3-10. Thereafter, the Legislature no longer approved grants and leases of the State riparian interest but instead delegated that responsibility to the Board and its successors, and to the Governor, where that authority currently resides. N.J. Stat. Ann. § 13:1B-13 (2003).

(7) The State of New Jersey exercised its regulatory jurisdiction over the riparian lands on its side of the Delaware

River not only by approving conveyances of riparian lands but also by setting pierhead and bulkhead lines. On November 3, 1877, the Board of Riparian Commissioners of the State of New Jersey adopted pierhead and bulkhead lines for a portion of the Delaware River within the Twelve Mile Circle in the County of Gloucester and the County of Salem. Record, No. 1, Orig. Pl. Ex. 144. By virtue of this action, the Board advised that it would look with favor upon applicants whose construction plans for piers and filling were within these lines, and look with disfavor upon those which were not.

(8) Grant[6] to Daniel H. Kent of Wilmington, Delaware by the State of New Jersey, dated February 17, 1883, now offshore of Block 2 Lot 1, Elsinboro Township. Tract 1 extends 300 feet on one side and 400 feet on the other to the exterior line established by the Riparian Commissioners in the Delaware River and Salem Cove. (Record, No. 11, Orig., Pl. Ex. 92; *id* Exs. 3, 57 (Grant "R"); Liber I, page 218.)[7]

When a mortgage on the upland on this property was foreclosed, this riparian grant was held to be included in the area foreclosed upon. *Boon v. Kent*, 42 N.J.Eq. 131, 7 A. 344 (Ch. 1886.)

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6. In New Jersey riparian law, fee simple conveyances of the State's riparian interests are by recordable deeds called "grants." N.J. Stat. Ann. § 12:3-7.

7. References to "Liber I page 218," and the like are references to the location of an official copy of New Jersey State tidelands instruments in the records of the Bureau of Tidelands Management, Trenton, New Jersey. All such documents typically are also recorded in the records of the County Clerks or Registers of the counties involved.

This grant also indicates that the Board of Riparian Commissioners adopted Pierhead and Bulkhead lines in the Delaware River in the Twelve Mile Circle before the Compact of 1905 was approved. (Record, No. 11, Orig., Pl. Ex. 92 at 2-3.)

(9) Grant to Annie E. Brown by the State of New Jersey dated August 28, 1891, now offshore of Block 2801, Lot 4, Pennsville Township. This grant extended 850 feet on one side into Delaware Bay and 850 feet on the other to the Exterior Line of the New Jersey Board of Riparian Commissioners. (Record, No. 11, Orig., Pl. Exs. 84, 85; *see also id.* Exs. 3, 57 (Grant "N"); Liber G, page 380.)

Mr. Sherman testified in the 1934 proceedings that the low water line was 50 to 75 feet below the high water line at this grant location, and that the property was used for amusement park purposes, in conjunction with adjacent grants. (Stip. Rec. at 274.) Thus, the upland owner could develop the waterfront at this location to the maximum extent of 800 feet beyond mean low water. This grant also indicates that the Board of Riparian Commissioners adopted Pierhead and Bulkhead lines in the Delaware River in the Twelve Mile Circle before the Compact of 1905 was approved.

(10) Grant to Eugene Dupont, et al., all of New Castle County, Delaware, trading as E.I. Dupont de Nemours and Company, by the State of New Jersey dated November 27, 1891. Now in the Township of Carneys Point, just south of Carneys Point, this grant extends from high water into the Delaware River 550 feet to the Commissioners' Exterior Line. (Record, No. 11, Orig., Pl. Exs. 70-72; *see also id.* Exs. 3

and 57 (Grant "E"); Liber G, page 386.) This grant also indicates that the Board of Riparian Commissioners adopted Pierhead and Bulkhead lines in the Delaware River in the Twelve Mile Circle before the Compact of 1905 was approved.

Actions of the State of New Jersey Asserting its Riparian Jurisdiction in the Delaware River Within the Twelve Mile Circle After the Compact of 1905.

(11) Grant to James A. Denny, et al., by the State of New Jersey dated April 26, 1906. Now offshore of Block 1 Lot 4, Penns Grove Borough, this grant extends 500 feet waterward of high water into the Delaware River. (Record, No. 11, Orig., Pl. Exs. 58, 59; *id.* Exs. 3, 57 (Grant "A"); Liber Q, page 721.)

Mr. Sherman testified that the "low water line at this location is 50 feet beyond the high water line, so that 450 feet of the area conveyed by the Riparian Commissioners [of New Jersey] to Denny would be beyond the low water line." (Stip. Rec. at 122.) The structure built within this grant is identified as Denny's Wharf on Riparian Atlas Sheet No. 710.[8]

(12) Grant to Pennsgrove Pier Co. by the State of New Jersey dated March 21, 1916. Now offshore of Block 57, Lot 1,

8. Riparian Atlas Sheets are on file with the Bureau of Tidelands, Trenton, New Jersey, and are a record of the actions of the State regarding riparian matters by location. The current versions of these indexes are called Conveyance Overlays.

Penns Grove Borough, this grant extends 885 feet outshore of high water on one side and 975 feet on the other to the New Jersey Pierhead and Bulkhead line. (Record, No. 11, Orig., Pl. Exs. 60, 62 and 63; *see also id.* Exs. 3, 57 (Grant "B"); Liber U, page 684.) This grant is recorded in the records of deeds of Salem County, New Jersey, in Deed Book 130, page 383.

This pier is identified on the tax map of the Borough of Penns Grove as Block 57, Lot 6. It is substantially outshore of mean low water, and it is taxed by Penns Grove.

This pier has been assessed for New Jersey municipal taxes since at least 1915. (Stip. Rec. at 116.) Riparian Atlas Sheet No. 710 identifies this as the Wilson Line Pier.

The taxability of this granted area by Penns Grove was the subject of the court's decision in *Main Associates, Inc. v. B. & R. Enterprises, Inc.*, 74 N.J. Super. 483, 181 A.2d 541 (Ch. Div. 1962.)

On July 13, 2004 Fenwick Commons, LLC, applied to the Delaware Department of Natural Resources and Environmental Control for a Subaqueous Lands Lease and Water Quality Certification to refurbish a 750 foot long pier and other structures and to fill 1,882 square feet of tidal lands at Penns Grove, Salem County, New Jersey. The pier involved was originally called the Penns Grove Pier. The area of the pier was the subject of the 1916 grant by the State of New Jersey. The Fenwick Commons application states that a portion of the filled area is lands between mean high water and mean low water. These lands are entirely in the State of New Jersey and appear to be approximately 722 square feet based on data in the application.

(13) Lease to Harry S. Barber by the State of New Jersey dated March 21, 1916. Now outshore of Block 54, Lots 1 and 2, Penns

Grove Borough, this lease extends 575 feet from the original high water line into the Delaware River. (Liber U, page 699.) This lease was convertible into a grant. A further fifteen year lease is dated July 17, 1916. (Liber V, page 57.) This lease was foreclosed upon on November 2, 1926. (Case 2652.)[9]

(14) On August 21, 1916, the Board of Commerce and Navigation, a successor agency to the Board of Riparian Commissioners, adopted pierhead and bulkhead lines on portions of the eastern side of the Delaware River. By doing so, the Board asserted New Jersey's riparian jurisdiction over the entire area landward of the pierhead lines. The entire area, including the portion landward of the exterior line for piers within the Twelve Mile Circle, extended well offshore of mean low water. By virtue of this action, the Board advised that it would look with favor upon applicants whose construction plans for filling and piers were within these lines, and look with disfavor upon those which were not. Plaintiff's Exhibit 145 in No. 11, Orig., shows the lines adopted between Penns Grove, New Jersey and Cedar Point, New Jersey. (Record, No. 11, Orig., Pl. Ex. 145.) The distances between low water and the exterior line scale from 375 feet at Deep Water Point (its nearest approach) to 3,550 feet waterward of low water at Helm's Cove, New Jersey.[10]

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9. References to "Case No." or "Tidelands Application No." are references to files now or formerly in the Bureau of Tidelands Management, Trenton, New Jersey. Not all files referenced have survived.

10. Plaintiff's Brief Before the Special Master 95, *New Jersey v. Delaware*, No. 11, Orig. (1933).

Appendix 5

(15) Grant to E. I. Dupont de Nemours & Co. ("Dupont") by the State of New Jersey, dated August 21, 1916. There are nine tracts, all within the Twelve Mile Circle in either Pennsville Township, Carneys Point Township or Penns Grove Township. The tracts extend from the high water mark into the Delaware River various distances from 202 feet on one side of Tract One to 4,222.1 feet (0.80 of a mile) on one side of Tract Seven. (Record, No. 11, Orig., Pl. Exs. 64, 68-69, 71-72; *id.* Exs. 2, 57 (Grant "D"); Liber V, page 92; Case No. 148.)

Mr. Sherman testified that the improvements on these properties included a sewer outfall, a seawall and a wharf. (Stip. Rec. at 135-36.) There also was a water intake pipe which extended a "substantial distance" into the River beyond the low water mark. (*Id.* at 138.)

(16) Grant to Dupont by the State of New Jersey dated November 20, 1916, now offshore of Block 301, Lot 1, Pennsville Township, at Deep Water Point. This grant extends 661.3 feet from high water on one side and 650 feet on the other, into the Delaware River, both to New Jersey's Pierhead and Bulkhead line (1915). (Record, No. 11, Orig., Pl. Exs. 66, 68, 69; *id.* Exs. 3, 57 (Grant "G"); Liber V, page 161; Case No. 493.)

(17) Grant to Dupont by the State of New Jersey dated July 16, 1917, consisting of two tracts, now offshore of Block 1 or 301, Lot 1, Pennsville Township. This grant extends 668 feet on one side of tract 1, and 648 feet on both sides of tract 2, outshore of the high water line and into the Delaware River, all to New Jersey's Pierhead and Bulkhead line (1916.)

Appendix 5

(Record, No. 11, Orig., Pl. Exs. 65, 68; *id* Ex. 3, 57 (Grant "F"); Liber W, page 62.)

(18) Lease to Dupont by the State of New Jersey dated May 20, 1918, now outshore of Block 301, Lot 1, Pennsville Township. This lease extended 736.21 feet waterward of the high water line of the Delaware River on one side and 718 feet on the other, both to New Jersey's Pierhead and Bulkhead Line (1916.) This lease was cancelled February 6, 1939 at Dupont's request, and riparian rights thereto reverted to the State of New Jersey by operation of law. N.J. Stat. Ann. § 12:3-10 (as amended 1938.) (Case No. 785A.)

(19) Grant to French's Hotel Company by the State of New Jersey dated October 17, 1921, now offshore of Block 57, Lot 1, Penns Grove Borough. This grant extends outshore from the high water mark 1,135.38 feet (0.21 miles) on one side and 1,283.86 feet (0.24 miles) on the other, and into the River. (Record, No. 11, Orig., Pl. Exs. 61-63; *id.* Exs. 3, 57 (Grant "C"); Liber C-1, page 217.) This grant is recorded in the records of deeds of Salem County, New Jersey, in Deed Book 166 page 330.

The area of this grant is identified on the tax map of the Borough of Penns Grove as Block 57, Lot 6.01. This lot is all or nearly all outshore of mean low water, and it is taxed by the Borough of Penns Grove.

(20) Grant to William D. Acton by the State of New Jersey dated February 19, 1923, now offshore of Pennsville Township. This grant extends 333.52 feet from the original high water line to the corner of a pre-existing pier, and another 580 feet further waterward to New Jersey's Pierhead and Bulkhead line (1916)

on one side, and 360.75 feet from the original high water line to a corner of a pre-existing pier, and another 572.66 feet further waterward to New Jersey's Pierhead and Bulkhead line (1916), on the other side. This pier was at the foot of Main Street in what was then Lower Penns Neck. (Record, No. 11, Orig., Pl. Exs. 89, 91; *id.* Exs. 3, 57 (Grant "P"); Liber D-1, page 459.)

In 1934, this grant area was used as a pier for the operation of the Delaware and New Jersey Ferry Company's ferry between Pennsville, New Jersey and New Castle, Delaware. Mr. Sherman further testified that this grant extended a "substantial distance" below the low water mark. (Stip. Rec. at 147.)

(21) Grant to William D. Acton by the State of New Jersey dated November 19, 1923, now offshore of Block 1091, Lot 2, Pennsville Township. This grant is within a tax lot in the records of Pennsville Township: Block 1091, Lot 2.01. It extends 970 feet on one side from the high water mark into the River, and 964 feet from the former high water line on the other side to New Jersey's Pierhead and Bulkhead line (1916.) (Record, No. 11, Orig., Pl. Exs. 86, 87; *id.* Exs. 3, 57 (Grant "L"); Liber E-1, page 245; Case No. 2040.)

Mr. Sherman testified there was a pier on the granted tract used for landing boats to carry people to and from a park adjoining the pier. This pier extended 494 feet below the low water mark. (Stip. Rec. at 145.) This was the pier used by the Riverview Beach Company. (Stip. Rec. at 275.) Riparian Atlas Sheet No. 704 identifies the upland parcel as Riverview Beach Park.

(22) Lease to Fogg and Hires Company for 15 years by the State of New Jersey dated August 18, 1924, now outshore of

Block 2801, Lot 6, Pennsville Township, at the foot of Ferry Road. This lease extends 985.44 feet offshore from the former high water line of the Delaware River on one side and an approximately equal distance offshore on the other side to New Jersey's Pierhead and Bulkhead line (1916.) (Liber G-1, page 135.)

This lease was cancelled May 18, 1930. In its place the State of New Jersey issued a grant to the Delaware - New Jersey Ferry Company dated May 19, 1930, with the same dimensions. (Record, No. 11, Orig., Pl. Ex. 90; *id.* Ex. 3, 57 (Grant "O"); Liber T-1, page 75; Case No. 2304.)

(23) Grant to William D. Acton by the State of New Jersey dated August 17, 1925, now offshore of Block 1091, Lot 2, Pennsville Township. This grant is within a tax lot in the records of Pennsville Township: Block 1091, Lot 2.01. This grant extends 863.21 feet from the former high water line into the Delaware River on one side, and 853.87 feet on the other, both to New Jersey's Pierhead and Bulkhead line (1916). (Record, No. 11, Orig., Pl. Exs. 80-81; *id.* Exs. 3, 57 (Grant "J"); Liber H-1, page 81; Case No. 2609.)

Mr. Sherman testified that this grant extended approximately 800 feet below the low water line. (Stip. Rec. at 142.) At that time there was a jetty in place to protect a beach from erosion, and an adjacent pier. The site was called Riverview Beach Park at Pennsville, an amusement park with bathing and boating. The adjacent dock was used for steamships, and the structures were assessed for local property taxes in New Jersey. (Stip. Rec. at 272-273.)

(24) Grant to William D. Acton by the State of New Jersey dated August 17, 1925, the same date as the previous grant,

now offshore of Block 2801, Lot 1, Pennsville Township. This grant extends 965.40 feet on one side and 966.63 feet on the other beyond the former high water line of the Delaware River to New Jersey's Pierhead and Bulkhead line (1916.) The grant is just south of the foot of Pittsfield Street, in what was then Lower Penns Neck Township. (Record, No. 11, Orig., Pl. Ex. 83; *id.* Exs. 3, 57 (Grant "M"); Liber K-1, page 58; Case No. 2204.)

(25) Grant to the Township of Lower Penns Neck by the State of New Jersey dated September 21, 1925, now offshore of Pennsville Township. This grant extends 966.83 feet on one side and 969.91 feet on the other, outshore of the former high water line of the Delaware River. This grant is at the foot of Pittsfield Street, in what was then Lower Penns Neck. (Record, No. 11, Orig., Pl. Ex. 82; *id.* Exs. 3, 57 (Grant "K"); Liber K1, page 94; Case No. 2204A.)

(26) Grant to William D. Acton by the State of New Jersey dated October 19, 1925, now outshore of Pennsville Township. This grant extends from the former high water line 360.75 feet to a point on an adjoining pier, and then another 572.68 feet into the Delaware River on one side to New Jersey's Pierhead and Bulkhead line (1916), and 375.41 feet to a point waterward and then another 565.67 feet further waterward to New Jersey's Pierhead and Bulkhead line (1916) on the other side. (Record, No. 11, Orig., Pl. Ex. 88; *id.* Exs. 3, 57 (Grant "O"); Liber H-1, page 171; Case No. 2717.)

(27) Grant to The Franklin Real Estate Company by the State of New Jersey dated June 18, 1928, now offshore of Block 301, Lot 13, Pennsville Township. This grant extends 991.46 feet from high water into the Delaware River on one side and 827.70

feet on the other, both to the New Jersey Pierhead and Bulkhead line (1916). (Record, No. 11, Orig., Pl. Ex. 73; *id.* Exs. 3, 57 (Grant "H").) The Deep Water Power Plant was constructed on the upland at this site. (*Id.* Ex. 74; Liber P-1, page 223.) This grant abuts the Delaware Memorial Bridge.

A confirmatory grant, as authorized by N.J. Stat. Ann. § 12:3-38, was approved for this property by the State of New Jersey on January 20, 1930. (Liber W-1, page 114.) There had been an error in identifying the name of the grantee in the 1928 grant. (Case No. 3446.)

(28) Grant to Anna C.B. Locuson by the State of New Jersey dated April 15, 1929, now offshore of Block 301, Lot 6, Pennsville Township. This grant extends 813.97 feet into the Delaware River from the high water line on one side and 809.16 feet on the other, both to New Jersey's Pierhead and Bulkhead line (1916.) (Record, No. 11, Orig., Pl. Ex. 76; *id.* Exs. 3, 57 (Grant "I-2"); Liber Q-1, page 169; Case No. 3851.)

(29) Grant to Josephine Grace Locuson, et al., by the State of New Jersey, dated April 15, 1929, now offshore of Block 301, Lot 7, Pennsville Township. This grant extends from the high water line of the Delaware River waterward 813.97 feet on one side and approximately 818.78 feet on the other, both to New Jersey's Pierhead and Bulkhead line (1916.) (Record, No. 11, Orig., Pl. Ex. 77; *id.* Exs. 3, 57 (Grant "I-3"); Liber Q-1, page 155; Case No. 3852-1.)

(30) Grant to Josephine Grace Locuson, et al., by the State of New Jersey, dated April 15, 1929, now offshore of Block 301, Lot 8, Pennsville Township. This grant extends from the high water mark 823.60 feet on one side and 818.78 feet on the other,

into the Delaware River, both to New Jersey's Pierhead and Bulkhead line (1916). (Record, No. 11, Orig., Pl. Ex. 78; *id.* Exs. 3, 57 (Grant "I-4"); Liber Q-1, page 149; Case No. 3854.)

Mr. Sherman testified that the low water line was 75 feet beyond the high water line at this location. (Stip. Rec. at 141-2.) Thus, the upland owner could develop the waterfront at this location to the maximum extent of 748 feet beyond the mean low water line.

(31) Grant to William G Locuson by the State of New Jersey, dated April 15, 1929, now offshore of Block 301, Lot 9, Pennsville Township. This grant extends 827.70 feet waterward of the high water line on one side and 823.60 feet on the other, both to New Jersey's Pierhead and Bulkhead line (1916.) (Record, No. 11, Orig., Pl. Ex. 79; *id.* Exs. 3, 57 (Grant "I-5"; Liber S-1, page 251; Case No. 3855.)

Mr. Sherman testified that low water was 75 feet beyond the high water mark at this grant location. (Stip. Rec. at 141-142.) Thus, the upland owner could develop the waterfront at this location to the maximum extent of 752 feet beyond mean low water.

(32) Grant to Josephine Grace Locuson, et al., by the State of New Jersey, dated June 17, 1929, now offshore of Block 310, Lots 4 and 5, Pennsville Township. This grant extends from the high water line 809.16 feet into the Delaware River on one side and 797.42 feet on the other, both to New Jersey's Pierhead and Bulkhead line (1916.) (Record, No. 11, Orig., Pl. Ex. 75; *id.* Exs. 3, 57 (Grant "I-1"); Liber Q-1, page 217; Case No. 3552-2.)

Appendix 5

Mr. Sherman testified in the 1934 proceedings that low water was 75 feet beyond the high water mark at this grant location. (Stip. Rec. at 140.) Thus, the upland owner could develop the waterfront at this location to the maximum extent of 734 feet beyond the mean low water line.

(33) Grant to Dupont by the State of New Jersey dated October 21, 1929, now offshore of Block 1 or 301, Lot 1, Pennsville Township. This grant extends from the mean high water mark 648 feet into the Delaware River to New Jersey's Pierhead and Bulkhead line (1916.) (Record, No. 11, Orig., Pl. Ex. 94; *id.* Exs. 3, 57 (Grant "T"); Liber Q-1, page 285.)

(34) License to the Delaware River Power Company by the State of New Jersey dated October 21, 1929, now offshore of Pennsville Township. This license accommodates eight armored submarine electric cables at Deep Water Point. The map attached to the grant shows both the high water line and the low water line, and shows the cables and the license extending well offshore of low water, 648 feet from high water to the exterior line. The distance from high water to low water at the time of this license was 75 feet. (Record, No. 11, Orig., Pl. Exs. 67, 68, 97; *id.* Exs. 3, 57 (Grant "U"); Case No. 4050)

Mr. Sherman testified that several concrete icebreakers were installed at this location "a substantial distance" below the low water mark for the purpose of protecting the cables. (Stip. Rec. at 151.)

(35) Lease to the Penn Beach Property Owners' Association by the State of New Jersey dated October 21, 1929, now outshore of Block 3524, Lot 1, Pennsville Township. This lease extended 429.49 feet beyond the mean high water line on one side and

430.70 feet on the other to New Jersey's Pierhead and Bulkhead line (1916.) (Record, No. 11, Orig., Pl. Ex. 95; *id.* Exs. 3, 57 (Grant "V"); Liber V-1, page 268.)

A sketch of the property at the time of the 1934 proceedings showed a timber pier extending in this lease area 80 feet beyond the low water mark and 130 feet beyond the high water mark. (Record, No. 11, Orig., Pl. Ex. 96.) A clubhouse was situated at the back of the pier, which was also used for boating and fishing. (Stip. Rec. at 277-78.)

This lease was converted into a grant on November 20, 1933 by the State of New Jersey. The dimensions of the grant remained the same as for the lease. (Liber C-2, page 33; Case No. 4008.)

Actions of the State of New Jersey Asserting its Riparian Jurisdiction Over the Lands of the Delaware River in the Twelve Mile Circle After the 1935 Decree.

(36) Grant to J. Landis Strickler by the State of New Jersey dated September 16, 1935, now outshore of Block 54, Lot 1, Penns Grove Borough. This grant extends 249.36 feet waterward of the center line of Delaware Avenue but follows the line of a previously existing sea wall. Although all of the lands conveyed in this grant were then upland, it appears that a portion of the granted land is waterward of the original former mean low water line. (Liber D-2, page 150.)

Portions of this property are within areas leased to Harry S. Barber in 1916 in two leases. The 1916 fifteen-year lease was foreclosed upon in 1926.

Appendix 5

(37) Grant to Dupont by the State of New Jersey dated September 13, 1943, now outshore of the Salem Canal, immediately north of Block 301, Lot 13.01, Township of Pennsville. A portion of these granted lands is outshore of mean low water measuring on the State's Conveyance Overlay to be approximately 210 feet. (Liber R-2, page 55; Case No. 4927-A.)

(38) Grant to Sun Oil Company by the State of New Jersey dated October 14, 1957, now outshore of Block 101, Lots 2 and 5, Logan Township, Gloucester County. This grant extends 1,245 feet from the mean high water line on one side and 1,245.82 feet on the other into the Delaware River. (Liber A-4, page 248; Case No. 8928-A.)

The tax map for Logan Township shows the area granted to the Sun Oil Company, an area nearly all below mean low water, as Block 101, Lots 2.01 and 2.02. Lot 2.01 appears to be upland, while Lot 2.02 is substantially below mean low water. Lot 2.02 is depicted and taxed by Logan Township even though it is substantially waterward of the state boundary line.

(39) Grant to Dupont by the State of New Jersey dated March 31, 1960, now outshore of Block 1, Lot 1, Pennsville Township. This grant extends 1,027.61 feet waterward of the high water line of the Delaware River on one side and 1,096 feet on the other, both out to New Jersey's Pierhead and Bulkhead line (1916.) The grant includes as a second tract a further area 100 feet waterward of that pierhead line. The grant of this second tract was expressly subject to approval by the United States Army Corps of Engineers. (Case No. 9490.)

Appendix 5

(40) Grant to Dupont by the State of New Jersey dated September 29, 1967. This grant is outshore of Block 1, Lot 1, Pennsville Township and abuts to the north the 1960 grant to Dupont, *supra*. It extends 1,096 feet offshore of the high water line of the Delaware River on one side and 1,155 feet on the other. The mean low water line measures on the State's Conveyance Overlay to be approximately 20 feet waterward of mean high water at this grant's location. (Liber R-5, page 80; Tidelands Application No. 66-43.) Thus, the upland owner could develop the waterfront at this location to the maximum extent of 1,135 feet beyond the mean low water line.

(41) A lease to Keystone Urban Renewal Limited Partnership by the State of New Jersey dated June 12, 1992. This lease is outshore of Block 101, Lots 2 and 5, Logan Township, Gloucester County and outshore of part of the State's 1957 Grant to the Sun Oil Company. (Liber H-8, page 79; Tidelands Application No. 91-0190.) This lease area extends approximately 1,600 feet offshore of the original mean high water line into the Delaware River.

The tax map for Logan Township shows the area granted to Sun Oil Company, an area nearly all below mean low water, as Block 101, Lots 2.01 and 2.02. The tax map further shows the area leased to Keystone, an area which is outshore of the Sun Oil grant, and therefore even further below mean low water, as Block 101, Lot 2.03. These lots are assessed and taxed by Logan Township. On September 30, 1991, the State of Delaware granted Keystone Cogeneration Systems, Inc. permission to construct a coal unloading pier and to conduct dredging at this location. The document included a Subaqueous Lands Lease for ten years, which may be renewed in the public interest.

Appendix 5

(42) A lease to William J. Bergmann, et al., by the State of New Jersey initially dated January 11, 1999, and renewed February 13, 2002. This lease extends 35 feet waterward of the high water line. It is located offshore of Block 1601, Lot 25, on North River Drive in the Township of Pennsville.

At this location, mean low water measures approximately 10 feet waterward of mean high water on the State's Conveyance Overlay. (Tidelands Application No. 87-1261.) Thus, the upland owner could develop the waterfront at this location to the maximum extent of 25 feet beyond the mean low water line.

(43) A lease to the Township of Pennsville by the State of New Jersey dated April 25, 2000. This lease is outshore of Block 3428, part of Lot 1 at the foot of Dartmouth Road. The leased area extends 95 feet offshore of the existing bulkhead and mean high water line (1999). (Tidelands Application No. 00-0012.)

At this location, the low water line measures not more than 60 feet waterward of the high water line on the State's Conveyance Overlay. Thus, the upland owner could develop the waterfront at this location to the maximum extent of 35 feet beyond the mean low water line.

(44) Assignment of Management Rights (lease) to the New Jersey Division of Parks and Forestry by the State of New Jersey dated January 24, 2001, now offshore of Block 5301, Lot 3, Elsinboro Township. The project site includes a pier outshore of the property. This pier extends 350 feet waterward of the high water line into the Delaware River. The lands involved are part of Fort Mott State Park, and the pier was rebuilt to its footprint as of 1898. (Liber M-9, page 74; Tidelands Application No. 95-0306.) New Jersey's Department of Environmental

Protection approved a Waterfront Development Permit and Water Quality Certificate (No. 1708-95-0014.1) on January 26, 1996. One of the Administrative Conditions in this permit imposed by New Jersey was that certain aspects of this project were subject to approval by the State of Delaware, specifically, the installation of floating ferry moorings, associated pilings and the removal of rip-rap against the crib structure below mean low water. Delaware's Department of Natural Resources and Environmental Control approved a subaqueous lands lease for this project on February 7, 1996.

The Adverse Impact of Delaware's Actions on the State of New Jersey and on Private Property Owners in the Twelve Mile Circle

9. The Twelve Mile Circle intersects the eastern bank of the Delaware River so that the State and local boundaries of seven New Jersey municipalities are all or partially at the mean low water line of the River. Those municipalities are Logan Township, Gloucester County, whose shoreline is partially within the Circle, Oldmans Township, Penns Grove Borough, Carneys Point Township, Pennsville Township and Elsinboro Township, all in Salem County, whose River shorelines are entirely within the Circle, and Lower Alloways Creek Township, Salem County, whose River shoreline is partially within the circle.

10. Because the shoreline is naturally irregular, the total length of the Delaware River shoreline in New Jersey between the northern intersection of the Circle and the southern intersection of the Circle with the low water line is approximately 29 miles. The State of New Jersey owns Fort Mott State Park in Pennsville

which has substantial waterfrontage on the Delaware River within the Twelve Mile Circle.

11. The State of New Jersey can, as a waterfront owner, seek State tidelands licenses for piers to be built along the eastern shore of the Delaware River within the Twelve Mile Circle. If it must also receive regulatory approval from the State of Delaware and secure a Delaware Submerged Lands conveyance, then there could be a significant negative effect on the State and its potential development of its public areas. For example, if the State of New Jersey wished to construct public fishing piers offshore of its lands or boardwalk trails to enhance public access in these State-owned upland areas, it would have to seek approval from Delaware regulatory officials as well as those of the State of New Jersey. This could lead to contradictory determinations from the permitting authorities.

12. Private riparian owners on the Delaware River in the Twelve Mile Circle would face the same problem. The prospect of contradictory determinations from the two States can reasonably be expected to discourage development applications.

13. The Bureau of Tidelands Management administers the State's riparian lands program. In turn, the income from the State's riparian lands program has been dedicated to the Fund for the Support of Free Public Schools by State constitutional provision since at least 1898. N.J. Stat. Ann. §§ 18A:56-5 and -6 (1999); N.J. Const. Art. VIII § 4 ¶ 2. Long term, a negative effect on development of the Twelve Mile Circle will have a direct negative impact on the income received by the Bureau for conveyances and leases and reduce the income received by the State's School Fund.

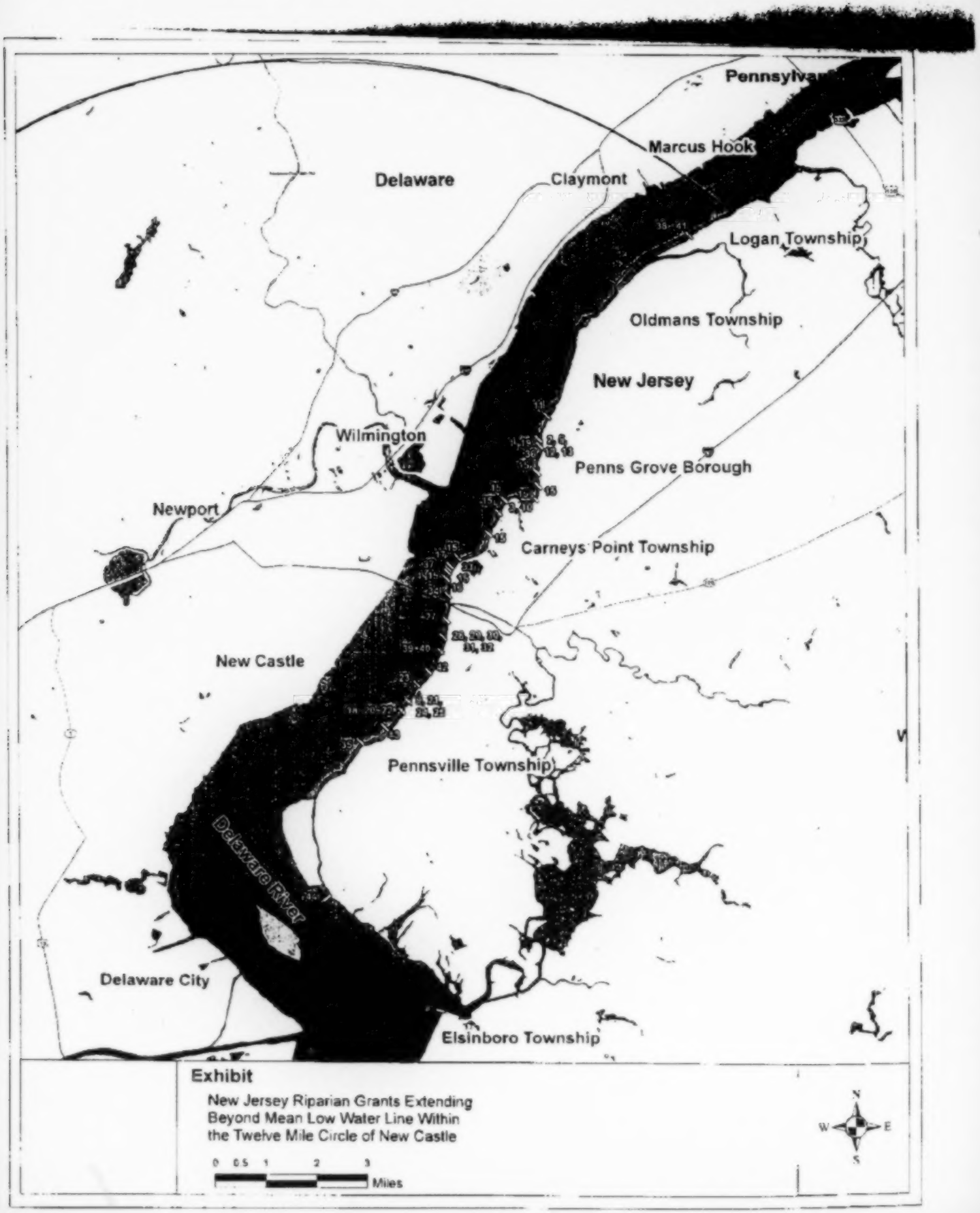
Appendix 5

_____/s/_____
Richard G. Castagna
Supervisor, Southern Region
Bureau of Tidelands Management
Post Office Box 439
Trenton, New Jersey 08625-0439
(609) 292-2573

Subscribed and sworn
to before me this
27th day of June 2005
_____/s/_____
Mary Ann Herman
Notary Public
State of New Jersey
My Commission Expires 2/28/07

APPENDIX 6 — AFFIDAVIT OF RICHARD CASTAGNA, EXHIBIT A-MAP OF NEW JERSEY RIPARIAN GRANTS *EXTENDING BEYOND MEAN LOW WATER LINE* WITHIN THE TWELVE MILE CIRCLE OF NEW CASTLE

[Map - fold-out page]


Pennsylvania
Marcus Hook
Delaware
Claymont
Logan Township
Oldmans Township
New Jersey
Wilmington
Penns Grove Borough
Newport
Carneys Point Township
New Castle
Pennsville Township
Delaware River
Delaware City
Elsinboro Township
Exhibit
New Jersey Riparian Grants Extending Beyond Mean Low Water Line Within the Twelve Mile Circle of New Castle
0 0.5 1 2 3
Miles
N
W
E
S

APPENDIX 7 — AFFIDAVIT OF JEFFREY READING, DATED JUNE 23, 2005

No. 11, Original

In The
Supreme Court of the United States

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF DELAWARE,

Defendant.

AFFIDAVIT OF JEFFREY T. READING IN SUPPORT OF MOTION TO REOPEN AND FOR A SUPPLEMENTAL DECREE

State of New Jersey:
SS
County of Mercer:

I, JEFFREY T. READING, being duly sworn according to law, upon his oath, deposes and says:

1. I am the Assistant Director of the Division of Water Quality, in the State of New Jersey, Department of Environmental Protection ("DEP"). I have served the DEP

in this capacity since 2000. I have knowledge of the matters set forth herein, based upon my personal knowledge and upon my review of the DEP files in this matter.

2. I have been employed by the DEP since 1980. From 1996 to 2000, I served as the Bureau Chief, Bureau of Point Source Permitting – Region 1. From 1992 to 1996, I served as Bureau Chief, Bureau of Watershed Permitting (formerly Bureau of Municipal Discharge Permits). From 1987 to 1991, I served as an Environmental Scientist I in the Bureau of Industrial Discharge Permits. From 1982 to 1987, I worked in the Bureau of Water Quality Standards and Analysis, serving as an Environmental Scientist I (1987), Environmental Scientist II (1986-1987), Environmental Scientist III (1983-1986) and Senior Environmental Specialist (1982-1983). From 1981 to 1982, I served as a Senior Environmental Specialist in the Bureau of Monitoring and Data Management. From 1980 to 1981, I served as an Environmental Specialist in the Bureau of Monitoring and Data Management. Since 1982, I have worked on various aspects of the development, review, issuance and monitoring of water pollution discharge permits.

3. The DEP's New Jersey Pollution Discharge Elimination System ("NJPDES") Program protects New Jersey's ground and surface water quality by assuring the proper treatment and discharge of wastewater (and its residuals) and stormwater from various types of facilities and activities, as well as municipalities, counties, public complexes and highway agencies. To accomplish this, permits are issued limiting the mass and/or concentration of pollutants which may be discharged into ground water, streams, rivers and the ocean, or through the imposition of best management

practices for stormwater discharges. The types of regulated facilities can range from very small users such as campgrounds, schools, and shopping centers to larger industrial and municipal wastewater dischargers.

4. The Federal National Pollution Discharge Elimination System Program, established by Congress pursuant to 33 *U.S.C.A.* §§ 1311 and -1342(a) (2005), is administered by the United States Environmental Protection Agency ("EPA"). From 1972 to 1981, EPA issued permits to dischargers located in New Jersey. In 1981, EPA delegated this permitting authority to New Jersey. Since then, that program has been implemented by New Jersey through the DEP's NJPDES program.

5. The legal authority for the NJPDES Program is the New Jersey Water Pollution Control Act, *N.J.Stat.Ann.* §§ 58:10A-1 *et seq.* (2004) and the federal Clean Water Act, 33 *U.S.C.A.* § 1251 *et seq.* (2005). The regulatory scheme for the NJPDES Program is set forth at *N.J.Admin.Code* §§ 7:14A-1 *et seq.* (2005).

6. The DEP administers the NJPDES Program throughout the State of New Jersey, regulating pollution discharges from sources within New Jersey even when the outfall crosses the boundary of New Jersey into the State of Delaware within the length of the Delaware River located in the Twelve Mile Circle. The NJPDES Program has issued permits for wastewater treatment projects that are located along this length of the Delaware River and that discharge beyond the low water mark on the New Jersey shore of the Delaware River.

Appendix 7

7. Under the Delaware River Basin Compact, the NJPDES Program provides notice to the Delaware River Basin Commission, notwithstanding the location with respect to State boundaries, of each application for a NJPDES permit to discharge pollutants to the Delaware River.

8. I directed the identification of permits issued by the NJPDES Program for pollution discharges from facilities located on the New Jersey shore of the Delaware River. The outfall pipe for each of the facilities extends below the low water line of the Delaware River within the Twelve Mile Circle, and thus crosses the boundary of the State of New Jersey into the State of Delaware. Each of these permits remains in effect. I discuss those NJPDES permits below, progressing from north to south.

9. The NJPDES Program has issued NJPDES permit number NJ0076872 DSW to the Logan Generating Company, f/k/a Keystone Energy Service Company, L.P., in Logan Township, Gloucester County, New Jersey, to discharge an average of 1,440 gallons of groundwater per day from an underdrain system and stormwater, at a steam and electricity cogeneration station into the Delaware River beyond the low water mark and within the State of Delaware through two outfall structures.

10. The NJPDES Program issued NJPDES permit number NJ0024023 DSW to the Penns Grove Municipal Sewerage Authority in the Borough of Penns Grove, Salem County, New Jersey, to discharge up to 0.75 million gallons of treated wastewater per day from a wastewater treatment facility into the Delaware River beyond the low water mark and wi[illegible]

the State of Delaware through an outfall pipe located 209 feet from shore at a depth of 7.08 feet below the surface of the Delaware River.

11. The NJPDES Program has issued NJPDES permit number NJ0005100 DSW to the E.I. duPont de Nemours & Co., Chambers Works Plant, in Pennsville Township, Salem County, New Jersey, to discharge up to 62.8 million gallons per day of treated industrial wastewater, stormwater and non-contact cooling water from a chemical manufacturing plant into the Delaware River beyond the low water mark and within the State of Delaware through three outfall structures that are located up to 50 feet from the shoreline.

12. The NJPDES Program has issued NJPDES permit number NJ0005363 DSW to the Atlantic City Electric Co., d/b/a Connectiv Power Delivery, Deepwater Generating Station, in Pennsville Township, Salem County, New Jersey, to discharge up to 350 million gallons per day of non-contact cooling water, stormwater, and intake screen backwash water per day from a steam electric generating station into the Delaware River beyond the low water mark and within the State of Delaware through up to 14 outfall structures that are located up to 100 feet from the shoreline.

13. The NJPDES Program has issued NJPDES permit number NJ0021598 DSW to the Pennsville Municipal Sewerage Authority in Pennsville Township, Salem County, New Jersey, to discharge up to 1.875 million gallons per day of treated wastewater per day from a wastewater treatment facility into the Delaware River beyond the low water mark and within the State of Delaware through an outfall pipe

located 102 feet from shore at a depth of 4.5 feet below the surface of the Delaware River.

_____/s/_____
Jeffrey T. Reading
Assistant Director
State of New Jersey
Department of Environmental Protection
Division of Water Quality
401 East State Street, Floor 3E
Post Office Box 029
Trenton, New Jersey 08625-0029
(609) 292-4543

Subscribed and sworn
to before me this
23 day of June, 2005

_____/s/_____
Louise Konjushok
Notary Public of the
State of New Jersey

APPENDIX 8 — AFFIDAVIT OF FREDERICK SICKELS, DATED JUNE 22, 2005

No. 11, Original

In The
Supreme Court of the United States

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF DELAWARE,

Defendant.

AFFIDAVIT OF FREDERICK SICKELS IN SUPPORT OF MOTION TO REOPEN AND FOR A SUPPLEMENTAL DECREE

State of New Jersey:
SS
County of Mercer :

I, FREDERICK SICKELS, being duly sworn according to law, upon his oath, deposes and says:

1. I am the Acting-Assistant Director of the Water Supply Permitting Element, in the State of New Jersey, Department of Environmental Protection ("DEP"), Division of Water

Supply. I have knowledge of the matters set forth herein, based upon my personal knowledge and upon my review of the DEP files in this matter.

2. The Bureau of Water Allocation within the Water Supply Permitting Element of the Division of Water Supply regulates all diversions of ground water and fresh surface water in New Jersey that are in excess of 100,000 gallons of water per day. *N.J.Stat.Ann.* § 58:1A-6 and -7 (2004). This includes water diverted for public water supply, industrial processing and cooling, irrigation, agriculture, sand and gravel operations, remediation, and power generation.

3. The Water Supply Permitting Element has exercised this jurisdiction since 2005. Prior to 2005, the DEP exercised this jurisdiction through its Water Supply Administration and its predecessor agencies. Prior to the establishment of the Department of Environmental Protection in 1970, the equivalent program was administered by the State of New Jersey, Department of Conservation and Economic Development.

4. Since 1907, the DEP Division of Water Supply and its predecessor agencies, the State Water Supply Commission; the Division of Water Policy and Supply; the Water Policy and Supply Council in the State Department of Conservation; the State Department of Conservation and Economic Development; and the Division of Water Resources, have been responsible for the economical and prudent development and equitable allocation of State's surface water resources for industrial and potable water supply.

5. The DEP Division of Water Supply administers the water supply management program throughout the State of New Jersey, regulating the diversion of water from a variety of sources, including the Delaware River, even where the diversion will withdraw water from the Delaware River through a pipe extending beyond the low water mark on the New Jersey shore of the Delaware River within the Twelve Mile Circle. The Water Resources Management section of the Bureau of Water Allocation has issued one water allocation permit to withdraw water from the Delaware River, along this length of the Delaware River, and through a pipe that extends beyond the low water mark on the New Jersey shore of the Delaware River.

6. Pursuant to the Delaware River Basin Compact between the States of New Jersey, Delaware, Pennsylvania and New York, *N.J.Stat.Ann.* § 32:11D-1 to -78 *et seq.* (2005), the Water Resources Management section of the New Jersey DEP's Bureau of Water Allocation ensures that each applicant for a Water Allocation Permit, to withdraw water from the Delaware River and into New Jersey, provides notice to the Delaware River Basin Commission. Such notice is provided by New Jersey for any request to withdraw water from the Delaware River into New Jersey, even if such withdrawal request involves an intake extending below the low-water mark within the Twelve Mile Circle.

7. My staff and I searched the databases and files of the Water Supply Permitting Element and identified a Water Allocation Permit number 4059 PS, that the DEP issued for an electricity and steam cogeneration facility located on the New Jersey shore of the Delaware River, that withdraws water

from the Delaware River, along the length of the Delaware River located in the Twelve Mile Circle, through a pipe that extends beyond the low water mark on the New Jersey shore of the Delaware River and crosses the boundary into the State of Delaware.

8. The DEP issued Permit number 4059 PS, dated April 10, 1991, to the Keystone Cogeneration Systems, Inc. in Logan Township, Gloucester County, New Jersey, to withdraw from the Delaware River up to 108.5 million gallons of water per month, at a maximum rate of 5,000 gallons per minute, for power generation operations at the facility. The intake structure for the water supply pipe is located at the outshore end of the pipe, approximately 1,600 feet from shore, at least 4 feet below the mean low water elevation and 2 feet above the bottom of the Delaware River. This permit remains in effect. The name of the permittee has been changed to Logan Generating Company, L.P.

9. As required by the Delaware River Basin Compact, Keystone Cogeneration Systems, Inc. provided to the Delaware River Basin Commission notice of its application to the DEP's Water Resources Management Section for Water Allocation Permit number 4059 PS. The DRBC considered the application under its Docket Number D-90-48, and issued a Notice of Commission Action on September 27, 1991, that modified the requested volume of water withdrawal. Pursuant to the State of New Jersey's obligations under the Delaware River Basin Compact, the DEP's Bureau of Water Allocation incorporated those limits into the final version of Water Allocation Permit number 4059 PS.

Appendix 8

_____/s/_____
Frederick Sickels

Post Office Box 426
Trenton, New Jersey 08625-0426
(609)292-2957

Subscribed and sworn
to before me this
22 day of June, 2005

_____/s/_____
David E. Leach IV
Notary Public of the
State of New Jersey

APPENDIX 9 — AFFIDAVIT OF KEVIN BRODERICK, DATED JUNE 16, 2005

No. 11, ORIGINAL

In The
Supreme Court of the United States

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF DELAWARE,

Defendant.

AFFIDAVIT OF KEVIN BRODERICK IN SUPPORT OF MOTION TO REOPEN AND FOR A SUPPLEMENTAL DECREE

Kevin James Broderick, of full age, being duly sworn according to law, hereby deposes and says:

1. I am employed by the Land Use Regulation Program (the "Program") of the State of New Jersey Department of Environmental Protection ("NJDEP"). I have been employed by NJDEP since 1980. I have knowledge of the matters set forth herein, based upon my personal knowledge and upon my review of the NJDEP files in this matter.

2. The Program administers and implements the New Jersey Waterfront Development Act, *N.J.Stat.Ann.* § 12:5-3 *et seq.*, Coastal Area Facility Review Act, *N.J.Stat.Ann.* § 13:19-1 *et seq.*, ("CAFRA"), the Coastal Wetlands Act, *N.J.Stat.Ann.* § 13:9A-1 *et seq.*, the Freshwater Wetlands Protection Act, *N.J.Stat.Ann.* § 13:9B-1 *et seq.* "FWPA", the Flood Hazard Area Control Act *N.J.Stat.Ann.* § 58:16 A-50 *et seq.*, ("FHACA") and the Program issues Water Quality Certificates pursuant to Section 401 of the Federal Clean Water Act (33 *U.S.C.* § 1251 *et seq*) for projects which require a federal permit of license and which propose to discharge fill or dredge material into waters of the United States. The purpose of the Certification is to insure that all such activities are consistent with New Jersey Water Quality Standards at *N.J.Admin.Code* 7:9-4.11 and the Federal Clean Water Act. The Program also issues Coastal Zone Consistency Determinations for State action under Section 307 of the Federal Coastal Zone Management Act (16 *U.S.C.* § 1451 *et seq.*), as amended, and certifies the proposed projects are consistent with the approved New Jersey Coastal Zone Management Program.

3. The New Jersey Legislature adopted the Waterfront Development Act in 1914 to coordinate navigation and development along the New Jersey waterfront and to address the construction or alteration of a dock, wharf, pier, bulkhead, bridge, pipeline, cable, or other similar or dissimilar waterfront development, *N.J.Stat.Ann.* § 12:5-3.

4. The Legislature adopted the Wetlands Act of 1970 to protect coastal wildlife and marine fisheries and to prohibit disturbances to coastal wetlands including altering marshes,

salt meadows, swamps and flats subject to tidal action in the State of New Jersey along the Delaware Bay and Delaware River. *N.J.Stat.Ann.* § 13:9A-1a.

5. The Legislature adopted the New Jersey Coastal Area Facility Review Act in 1973 to protect New Jersey's bays, harbors, sounds, wetlands inlets, tidal portions of fresh, saline or partially saline streams and tributaries and their adjoining upland fastland, beaches and intertidal areas, all of which the Legislature has found to constitute an exceptional unique, irreplaceable and delicately balanced coastal area. *N.J.Stat.Ann.* § 13:19-1.

6. Since 2002, I have served as the Manager of the Program's Bureau of Coastal Regulation along the New Jersey coast in Monmouth, Ocean, Atlantic, Cape May, Salem, Cumberland, Gloucester and Camden counties. As manager of the Program's Bureau of Coastal Regulation, I supervise and direct the implementation of Coastal Zone Programs, as well as the FWPA and the FHACA along the New Jersey coast in Camden, Gloucester, Cumberland, Salem, Cape May, Atlantic, Burlington, Ocean and Monmouth counties along the Delaware River, the Delaware Bay and the Atlantic Ocean.

7. Previously, between 1989 and 2001, I served as the supervisor for all of the coastal development projects in Cape May, Cumberland, Salem, Gloucester, Camden and Ocean counties. This area includes the five New Jersey municipalities of Logan Township in Gloucester County, and Penns Grove, Carneys Point, Pensville, and Elsinboro Township of Salem County, all of which include lands within the Twelve Mile Circle area defined in *New Jersey v.*

Appendix 9

Delaware, 295 U.S. 694, 55 S.Ct. 907, 79, L.Ed. 1659 (1935) (decree) (hereafter the "New Jersey Municipalities").

8. In my tenure as a supervisor for coastal development projects in Cape May, Cumberland, Salem, Gloucester, Camden and Ocean counties, I have inspected hundreds of sites for applications for proposed development for all types of structures which are attached to the adjoining uplands and which involve development of lands outshore of the low water line. These include, but are not limited to bulkheads, stormwater pipes, rip-rap, boat ramps, and docks and piers along the shorebanks and into the tidal waters of the Delaware River under the Waterfront Development Act, the Coastal Wetlands Act and CAFRA.

9. In cooperation with Mark Fedorowicz of the Program who serves as the custodian of the records of the actions of the Program in Salem and Gloucester Counties in which the Twelve Mile Circle lies, during the last month, I have caused a search to be done of records and files under the Program's various databases that exist for permits issued in the New Jersey Municipalities. The initial New Jersey coastal zone management rules were adopted in September 1978 and the databases of files date back to 1979. I have caused a search of the files to be done, both at the offices of the Program at 501 East State Street, Trenton, New Jersey 08611 and at the Program's warehouse at 1651 North Olden Avenue, Ewing Township, New Jersey 08638, for development applications involving waterfront property in the New Jersey Municipalities.

Appendix 9

10. Altogether, I have caused to be searched the relevant databases at the Program offices and at the Ewing Township warehouse, including approximately 350 boxes of archived files of the Program for the years 1979 through 1989. As a result, the Program has identified 58 development applications seeking permits which were listed in the database for the New Jersey Municipalities and which were submitted to the Program between 1979 and 1989. I have reviewed the 14 application files that could be found at the warehouse for this timeframe. In addition, the Program has reviewed another 22 development applications for the years between 1989 and 2001 for lands which are located in the New Jersey Municipalities.

11. The Program has issued a number of permits for development that starts on the New Jersey shore and extends into the Delaware River beyond the mean low water line within the Twelve Mile Circle.

12. In particular, the Program issued a 1982 Waterfront Development permit for the Dupont facility in Carneys Point (Agency File Number 82-0519-1). This permit was for dredging of the berth area of an existing pier and authorized dredging at least 200 feet beyond the mean low water line within the Twelve Mile Circle.

13. In 1991, the Program issued to Keystone Cogeneration Systems Inc. in Logan Township stream encroachment, waterfront development and freshwater wetlands permits and a Water Quality Certificate (Agency File Numbers 0809-91-0010.1, 0010.2, 0010.3 and 0010.6) for a coal unloading facility and the approach-way pier. These facilities have a

combined length of approximately 1700 feet, and extend beyond the low water line within the Twelve Mile Circle, at a point where the Delaware River is approximately 4000 feet wide. The coal unloading pier is approximately 2300 feet from the main shipping channel of the river and 150 feet from the Marcus Hook Authorized Anchorage line. The State of Delaware also asserted jurisdiction and issued permits for this project.

14. In 1996, the Program issued a Waterfront Development permit to the Department's Division of Parks and Forestry for the rehabilitation of a pier at Fort Mott State Park in Elsinboro Township (Agency File Number 1708-95-0014.1). The pier extends 350 feet waterward of the high water line into the Delaware River. The New Jersey permit required approval by the State of Delaware for the installation of floating ferry mooring associated pilings and removal of rip-rap against the crib structure below mean low water. New Jersey's DEP application (dated September 19, 1995) indicates that it would apply to the Delaware Department of Natural Resources and Environmental Control.

15. In 2000, the Program issued to Pennsville Township a Waterfront Development permit for repairs and replacement to a municipal boat-ramp (Agency File Number 1708-00-0001.1, 1.2). At the boat-ramp location, mean low water is approximately 60 feet from the bulkhead and the ramp extends at least 30 feet beyond the mean low water line within the Twelve Mile Circle.

Appendix 9

16. In 2001, the Program issued a Waterfront Development permit to Pennsville Township (Agency File Number 1708-01-0004.1), for installation of over 100 feet of stormwater force main pipes. The permitted improvements extend through the intertidal beach area to approximately 9 feet beyond the mean low tide line within the Twelve Mile Circle.

17. The above statements are true to the best of my knowledge and I am aware I am subject to penalties for any knowingly false statements contained herein.

/s/
Kevin J. Broderick, Manager
Bureau of Coastal Regulation
Land Use Regulation Program
New Jersey Department of Environmental Protection
501 East State Street
P.O. Box 439
Trenton, New Jersey 08625-0439
(609) 984-3444

Sworn and
subscribed before me on
this 16th day of June, 2005

Lewin Weyl
Attorney at Law
State of New Jersey

APPENDIX 10 — AFFIDAVIT OF STEVEN C. WHITNEY, DATED JULY 27, 2005

NO. 11, ORIGINAL

In The
Supreme Court of the United States

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF DELAWARE,

Defendant.

AFFIDAVIT OF STEVEN C. WHITNEY IN SUPPORT OF MOTION TO REOPEN AND FOR A SUPPLEMENTAL DECREE

Steven C. Whitney, of Little Deer Isle, Maine, of full age, being duly sworn according to law hereby deposes and says:

1. I am retired from a twenty-seven year career at the New Jersey Department of Environmental Protection ("DEP") from 1970 to 1997.

2. From January 1975 to July 1979, I served as Supervisor in the Office of Coastal Zone Management in the Division of Coastal Resources. The office implemented and administered New

Jersey's Coastal Area Facilities Review Act, N.J. Stat. Ann. 13:19-1 to -33, first effective September 18, 1973. During that time, I was part of the staff that prepared the New Jersey Coastal Management Program and Final Environmental Impact Statement (August 1980) ("1980 CMP"). New Jersey's CMP was adopted in two segments. In 1978, New Jersey adopted a CMP for the Bay and Ocean Shore (1978 CMP). With respect to the area known as the Twelve Mile Circle, the 1978 CMP stated that continued coordination and work toward appropriate agreements between the coastal management programs of the two states would be required to resolve potential conflicts between the coastal policies of New Jersey and Delaware. (1978 CMP at 19.) In 1980, New Jersey adopted a revised CMP, which also covered waterfront areas along New Jersey's tidally influence waterways. (1980 CMP).

3. The 1980 CMP was an extensive document, covering many issues. With respect to the area known as the Twelve Mile Circle, the 1980 CMP stated that New Jersey and Delaware coastal management agencies had discussed the boundary issue and concluded that ". . . any New Jersey project extending beyond mean low water must obtain coastal permits from both states. New Jersey and Delaware, therefore, will coordinate reviews of any proposed development that would span the interstate boundary to ensure that no development is constructed unless it would be consistent with both state coastal management programs." (1980 CMP, page 20). However, as set

forth below, the States were unable to reach any final agreement about how to accomplish this. Further, during my term of service with the DEP, to my knowledge, New Jersey never adopted any regulation requiring any person seeking to construct an improvement appurtenant to the New Jersey side of the River to obtain any permit or approval from the State of Delaware.

4. From July 1979 to June 1988, I served as Chief of the Bureau of Planning and Project Review in the Division of Coastal Resources. Then, from June 1988 to July 1991, I served as Assistant Director of the Division of Coastal Resources. From July 1991 to January 1997, I served as Manager, Environmental Planning, Coastal/Land Planning Group.

5. In these capacities, I participated in discussions with the Coastal Management Program regulatory and planning staffs about the New Jersey/Delaware boundary line and what effects it had on permit decision-making. I also participated in other discussions and conferences with Delaware staff which addressed these topics.

6. The 1978 and 1980 CMPs and the discussions which followed led my office to develop between 1991 and 1994 a draft Memorandum of Agreement between New Jersey and Delaware. The purpose of the MOA was to establish a framework within which the DEP and Delaware's Department of Natural Resources and Environmental Control could share relevant

information regarding specified regulatory programs and actions along the States' common boundary within the Twelve Mile Circle.

7. The June 16, 1994 draft MOA would have provided that New Jersey and Delaware would share information concerning relevant applications and concerning proposed relevant rulemaking, and that the States would agree to work together to resolve inconsistencies between the Programs. In addition, the draft MOA stated that each agency had "the independent authority to approve or deny applications pursuant to its own regulations."

8. However, during the review process of the draft MOA within DEP, objections were raised. In general, there were concerns about becoming involved in an overly cumbersome approval process, and about giving a veto to Delaware as to projects that otherwise would have met New Jersey standards. As a result, in 1994, New Jersey abandoned efforts to reach an agreement on these matters.

9. The above statements are true to the best of my knowledge, and I am aware I am subject to penalties for any knowingly false statements contained herein.

/s/
Steven C. Whitney
27 Mourning Dove Lane
Little Deer Isle, ME 04650

Appendix 10

Sworn and subscribed before
me on this 27 day of July 2005

_____/s/_____
Myra P. Weed
Notary Public of the
State of Maine

APPENDIX 11 — AFFIDAVIT OF JEANNE M. FOX, DATED JUNE 20, 2005

No. 11, Original

In The
Supreme Court of the United States

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF DELAWARE,

Defendant.

AFFIDAVIT OF JEANNE M. FOX IN SUPPORT OF MOTION TO REOPEN AND FOR A SUPPLEMENTAL DECREE

State of New Jersey:
SS
County of Essex :

Jeanne M. Fox, being duly sworn upon her oath, hereby deposes and states the following:

1. I am the President of the New Jersey Board of Public Utilities (Board). I am fully familiar with the matters stated herein.

2. The Board is charged by statute with the supervision and regulation of all public utilities in the State of New Jersey. *N.J.S.A.* 48:2-13. The Board is responsible for ensuring that the public utilities provide safe, adequate and proper service. In addition, the Board must set just and reasonable rates. *N.J.S.A.* 48:2-21.

3. By application dated September 16, 2004, Crown Landing, LLC, filed at the Federal Energy Regulatory Commission (FERC) for authorization to site, construct and operate a liquefied natural gas (LNG) import facility in Logan Township, New Jersey.

4. By application dated February 17, 2004, Texas Eastern Transmission, LP (Texas Eastern), filed at FERC for authorization to construct, own, operate and maintain pipeline facilities and related appurtenances to interconnect its pipeline system with the proposed LNG facility.

5. The proposed LNG terminal would consist of facilities capable of unloading LNG ships and storing up to 450,000 cubic meters of LNG (9.2 billion cubic feet of natural gas equivalent). The terminal would include facilities for vaporizing the LNG and sending out natural gas at a baseload rate of 1.2 billion cubic feet per day (Bcfd) and a maximum rate of 1.4 Bcfd.

6. Crown Landing proposes to interconnect the LNG facilities onsite with three pipelines. One interconnect would be with the new pipeline that Texas Eastern proposes to construct and operate between its existing Chester Junction facility in Brookhaven Borough, Pennsylvania and the

proposed LNG terminal (Logan Lateral). The other two interconnects would be with existing pipelines that currently cross the LNG site and are operated by Columbia Gas Transmission Company (Columbia Gas) and Transcontinental Gas Pipe Line Corporation (Transco), respectively. The Crown Landing LNG facility would have a maximum capacity of 0.5 Bcfd to the Columbia Gas pipeline system, 0.6 Bcfd to the Transco pipeline system, and 0.9 Bcfd to the Texas Eastern pipeline system.

7. North America holds 4% of the world's natural gas proven reserves but consumes over 30% of the world's natural gas. The remaining 96% of the world's natural gas reserves are located in other countries; the Logan Township facility would receive and unload LNG from around the world.

8. The LNG terminal and the proposed pipeline facilities would provide much needed gas supply to the capacity-constrained Northeast, where FERC has stated that LNG now comprises 2% of the natural gas used and could provide up to 17% of natural gas by 2025.

9. In particular, the Logan Lateral pipeline will provide up to 900,000 decatherms per day (Dth/d) of direct access to significant supplies of competitively priced and clean burning natural gas into the eastern portion of Texas Eastern's pipeline system. This additional supply and capacity should help to mitigate the recent volatility of natural gas prices. This additional gas supply and capacity will serve the growing demand in the mid-Atlantic region, including New York, New Jersey, Pennsylvania, Delaware and Maryland, as well as in the Northeast. This additional access will provide shippers

on the Texas Eastern and other interconnecting pipeline systems with an additional supply alternative, and thus enhanced reliability of supply.

10. Texas Eastern states that this new supply will enhance operational flexibility and reliability during peak demand periods and during scheduled maintenance. Scheduled maintenance is expected to increase as a result of new pipeline safety requirements.

11. LNG becomes economically competitive to domestic gas supply when the retail price of domestic gas rises above $3.50 per million British thermal units (MBtu), which is well below the current spot and futures prices. The composite spot price for natural gas on the wholesale market has risen from $2.16 per ten thousand million British thermal units (MMBtu) in 1999 to $5.77/MMBtu in 2004. Current projections for 2005 are in the range of $6.75/MMBtu. New York Mercantile Exchange (NYMEX) natural gas futures have similarly risen from $2.27/MMBtu in 1999 to $6.14/MMBtu in 2004, with 2005 projections being $6.55/MMBtu. NYMEX closed on May 25, 2005 at $6.31/MMBtu.

12. New Jersey is a consuming state, meaning that we do not have any natural energy resources. With respect to natural gas, the State is primarily dependent on interstate pipelines to deliver our natural gas supply. Southern New Jersey is even more dependent on this mode of transportation as it is bounded on three sides by water. This area of our State is served exclusively by South Jersey Gas Company (SJG). Approximately 313,000 residential, commercial and industrial customers receive their natural gas from SJG. The

area continues to experience an increased demand of about 3% per year for natural gas due to new construction and existing home conversions from electric or oil heat to natural gas.

13. SJG receives its natural gas supply from only two interstate pipeline systems, while northern New Jersey enjoys much greater access to pipelines. The southern area is more vulnerable to service interruptions should problems with one or both of the two transmission systems occur.

14. When one or both transmission systems experience a failure of supply such that they are unable to meet their firm contractual obligations, SJG purchases gas on the open market, which typically results in increased prices.

15. The New Jersey Board of Public Utilities supports increases in sources of supply, especially since New Jersey, and in particular southern New Jersey, is in a growth mode. Assuming all environmental and safety concerns are properly addressed, the proposed LNG facility would provide another source of natural gas, which is vital to our State since North American production is forecast to decline over the next twenty years, and adequate pipeline capacity to access the Alaskan reserves does not yet exist. The proposed LNG facility, if built with appropriate safeguards for our environment and our security, would provide additional gas from diverse areas which should increase reliability and promote greater competitiveness in pricing.

Appendix 11

_____/s/_____
JEANNE M. FOX
President
New Jersey Board of Public Utilities
2 Gateway Center
Newark, New Jersey 07102
(973) 648-2026

Subscribed and sworn
to before me this
20th day of June, 2005

_____/s/_____
Teresa M. Sellmeyer
Notary Public of the
State of New Jersey

APPENDIX 12 — AFFIDAVIT OF AMY DONLON, DATED JULY 25, 2005

No. 11, Original

In The
Supreme Court of the United States

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF DELAWARE,

Defendant.

AFFIDAVIT OF AMY C. DONLON IN SUPPORT OF MOTION TO REOPEN AND FOR A SUPPLEMENTAL DECREE

State of New Jersey:
SS
County of Mercer :

I, AMY C. DONLON, being duly sworn according to law, upon her oath, deposes and says:

1. I am over eighteen years of age, and I have personal knowledge of the facts stated in this Affidavit.

2. I am a Deputy Attorney General for the State of New Jersey.

3. On May 17, 2005, I sent a Freedom of Information Act ("FOIA") Request, pursuant to the Delaware Freedom of Information Act, Del. Code Ann. tit. 29, § 10001 (2005), to Laurie Moyer, Paralegal, State of Delaware, Division of Water Resources, Department of Natural Resources & Environmental Control ("DNREC"). My FOIA request sought, in part, records from DNREC relating to coastal zone permits and/or subaqueous lands permits applied for by any person, or issued to any person, for activities within the Twelve-Mile Circle around New Castle, Delaware. A copy of this letter is attached as **Exhibit A**.

4. On June 10 and 24, 2005, I received copies of records from DNREC in response to my FOIA request. These records related to both subaqueous land permits and leases issued by DNREC pursuant to the Delaware Subaqueous Lands Act, 65 Del. Laws ch. 508 (1986), codified at Del. Code Ann. tit. 7, §§ 7201-7217 (2005) (the "DSLA"), and applications submitted to DNREC pursuant to the Delaware Coastal Zone Act, 58 Del. Laws ch. 175 (1971), codified at Del. Code Ann. tit. 7, §§ 7001-7013 (2005) (the "DCZA"). The geographic scope of the records provided by DNREC was limited to: "the New Jersey side of the Delaware River, i.e., from the main channel of the Delaware River to the New Jersey shoreline, within the Twelve-Mile Circle." See copy of May 31, 2005 letter attached as **Exhibit B**.

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The DSLA Records

5. Specifically, with regard to leases and permits applied for and/or issued pursuant to the DSLA, DNREC provided copies of its records relating to five utilities that had installed or proposed to install submerged utility pipelines across the Delaware River between Delaware and New Jersey within the Twelve-Mile Circle. These utilities included: Columbia Gas Transmission Corp.; AT&T; Colonial Pipeline Co.; Delmarva Power & Light Co./ Connectiv Communications, Inc.; and Sunoco Inc.

6. Further, in addition to the cross-River utility pipelines described above, with regard to leases and permits applied for and/or issued pursuant to the DSLA, DNREC provided copies of its records relating to six properties:

(a) the E.I. Du Pont De Nemours & Co., Chambers Works facility, located in Deepwater, Pennsville Township, New Jersey ("DuPont");

(b) the Keystone Cogeneration System, Inc. located in Logan Township, Gloucester County, New Jersey ("Keystone/ Logan");

(c) Fort Mott State Park, located in Salem County, New Jersey;

(d) Fenwick Commons, LLC, proposed project location in Penns Grove, Salem County, New Jersey;

(e) Crown Landing, LLC, proposed location in Logan Township, Gloucester County, New Jersey; and

(f) Allied Chemical Corp. located in Claymont, Delaware.

Appendix 12

DuPont

7. With regard to DuPont, the FOIA response included a carbon copy of a September 30, 1957 letter from Alan L. Skinner, Esq. ("Mr. Skinner"), of the DuPont Legal Department, to R.A. Haber, Chief Engineer of the Delaware State Highway Department. A copy of this letter is attached as **Exhibit C**. This letter states that Delaware did not have authority under Article VII of the "Treaty of 1905" to insist on Delaware approval as a condition of the issuance of a permit by the United States Army Corps of Engineers for a structure on the New Jersey side of the River within the Twelve-Mile Circle and that "[t]his is a case of first instance with us[.]"(*Id.*) The letter further stated:

> It is our opinion that, pursuant to the terms of the above mentioned Treaty of 1905 and the U.S. Supreme Court decision of 1933 [sic], the State of New Jersey is the proper authority with which we should deal in connection with any lands lying under the Delaware River, but on the New Jersey side of the River and within the 12-mile circle. (*Id.*)

8. Also included in the FOIA response were copies of several letters reflecting the response of the Delaware State Highway Department to Mr. Skinner's September 30, 1957 letter.

(a) On October 25, 1957, R.A. Haber ("Mr. Haber") of the Delaware State Highway Department wrote to Mr. Skinner that the Department had approved the proposed

DuPont outfall and that "[t]he Department further directed that your letter of September 30th be forwarded to our Attorney, and that he be asked to contact you directly to determine if possible the future status of such requests." A copy of this letter is attached as **Exhibit D**. The Department's attorney, S. Samuel Arsht ("Mr. Arsht"), was identified as a "cc" on this letter.

(b) On December 2, 1957, Mr. Arsht wrote to Mr. Haber, with a "cc" to Mr. Skinner, that he "concur(red) in Mr. Skinner's opinion that, pursuant to the terms of the Treaty of 1905 and the United States Supreme Court decision of 1933, [sic] the State of New Jersey is the proper authority with which the DuPont Company should deal in connection with any lands lying under the Delaware River within the boundary of the State of Delaware, but on the New Jersey side of the river and within the twelve-mile circle." A copy of this letter is attached as **Exhibit E.** Mr. Arsht further recommended that the Delaware State Highway Department notify the U.S. Army Corps of Engineers "that the State of Delaware has no jurisdiction over grants that may be made in and to the lands lying under the Delaware River on the New Jersey side thereof and within the twelve-mile circle, and that the prior approval of the State of Delaware in such matters is not required." (*Id.*)

(c) On January 8, 1958, Mr. Arsht wrote to Mr. Skinner advising that the Delaware State Highway Department had adopted a resolution on December 11, 1957, which resolution, according to the letter, stated as follows:

> On motion duly made, seconded and carried, the Department, taking cognizance of the above

> opinion (of S. Samuel Arsht, Department Attorney, to Mr. R.A. Haber, Chief Engineer, dated December 2, 1957), directed the Chief Engineer to notify the Corps of Engineers, U.S. Army, that while the Department has no jurisdiction over the area mentioned, the Department wishes to be notified of all permits requested and granted.

A copy of this letter is attached as **Exhibit G**.

(d) The letter from Mr. Arsht to Mr. Skinner of January 8, 1958 enclosed a letter dated December 13, 1957, from Mr. Haber to the U.S. Army Corps of Engineers. A copy of this December 13, 1957, letter is attached as **Exhibit F.** In it, Mr. Haber wrote that the Delaware State Highway Department had decided to continue requesting information from the U.S. Army Corps of Engineers regarding "proposed work in, on, or under the Delaware River on the New Jersey side provided, however, that no permit of the Corps of Engineers permit be held up or otherwise delayed" if Delaware failed "to act upon it." (*Id.*) The letter advised, by contrast, that "[i]f any work is contemplated or requested on the Delaware side, then, of course, no permits should be issued without approval of the Delaware State Highway Department." (*Id.*)

9. Also included in the FOIA response was a February 10, 1971 letter from Mr. Skinner to Mr. John C. Bryson, Director of Environmental Control Division, Department of Natural Resources of the State of Delaware, disputing the necessity of entering into a subaqueous lease with Delaware in order

for DuPont to construct a fuel oil storage tank appurtenant to the New Jersey shoreline. The letter of February 10, 1971 is attached as **Exhibit H**. Mr. Skinner wrote: "This question of jurisdiction is not new to us, having been raised in 1957 by R.A. Haber, Chief Engineer of the Delaware State Highway Department. At that time, it was determined that the State of Delaware had no jurisdiction in such matters on the easterly side of the Delaware River." (*Id.*) Mr. Skinner attached copies of previous correspondence dated December 2, 1957, and January 8, 1958, from Mr. Arsht, attorney for the Delaware State Highway Department.

10. Also included in the FOIA response was a letter dated June 7, 1971, from E.T. Fogg, Works Engineer for DuPont, to B.E. Lane, of the Delaware Water and Resources Commission. A copy of this letter is attached as **Exhibit I**. This letter was written in connection with an application for permission to construct a tanker unloading and oil storage facility on riparian lands on the New Jersey side of the River within the Twelve-Mile Circle. The letter stated:

> It is DuPont's position that the 1905 Treaty between New Jersey and Delaware ceded to the State of New Jersey full authority over subaqueous lands from the New Jersey shore to the center of the Delaware River, including the right to convey title to such lands; and that the subsequent Supreme Court cases did not, and in fact could not, modify the terms of said Treaty. It was in reliance on the Treaty that the DuPont Company purchased the lands in question from the State of

> New Jersey in 1916. . . . The application is therefore filed with the understanding that such filing is without prejudice to either DuPont or the State of Delaware with regard to any questions that might arise as to the adequacy of DuPont's title, and that payment of dredging and lease charges shall be reserved. (*Id.*)

11. Also included in the FOIA response was a September 29, 1971 subaqueous lands lease issued to DuPont by Delaware. This lease is attached as **Exhibit J**. In the lease, Delaware agreed to defer collection of $60,647 in leasing fees, and DuPont agreed to pay the leasing fees plus 6% interest "in the event that the disputed title to the subaqueous lands in question is resolved in favor of [Delaware] at some future date under a final judgment of a federal court of competent authority." (*Id.*).

12. Also included in the FOIA response was a copy of a letter dated October 23, 1981, from June D. MacArtor, Deputy Attorney General, State of Delaware, to Mr. Skinner indicating that "the $60,647.00 plus 6% interest from September 29, 1971 is presently due and owing." This October 23, 1981 letter is attached as **Exhibit K**.

13. Also included in the FOIA response was a copy of the response letter dated October 27, 1981, from Mr. Skinner to Deputy Attorney General MacArtor. This October 27, 1981 letter is attached as **Exhibit L**. The letter enclosed previous correspondence between DuPont and Delaware from 1957 and 1958 concerning the Compact of 1905. Mr. Skinner again

concluded: "It is my opinion that New Jersey has jurisdiction over the matters covered by the 1971 lease as previously agreed to by S. Samuel Arsht, Esq., and the Delaware State Highway Department." DNREC produced no documents in response to my FOIA request indicating that its lease dispute with DuPont was resolved or that DuPont paid the lease payments to Delaware.

14. Also included in the FOIA response was a Letter of Authorization dated March 18, 1982, from DNREC to DuPont for the reconstruction of a subaqueous lands structure.

15. Also included in the FOIA response was a letter dated October 15, 1982, from DNREC to DuPont authorizing maintenance dredging in the Delaware River.

16. Also included in the FOIA response was a letter dated January 5, 1987, from DNREC to DuPont authorizing repair work to a subaqueous structure.

17. Also included in the FOIA response from DNREC was a Subaqueous Lands Permit issued May 4, 2001, allowing DuPont "to dredge approximately 4,650 cubic yards of material and to backfill to existing elevations in a 0.71 acre site in the Delaware River; and to install a temporary sheet pile wall surrounding the excavation in the Delaware River, near Deepwater, New Jersey, in New Castle County, Delaware."

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Keystone/Logan

18. With regard to Keystone/Logan, the FOIA response included a copy of a DNREC subaqueous lands lease issued to Keystone/Logan on September 30, 1991, "for the construction of an industrial pier on public subaqueous lands and to conduct dredging in the Delaware River at Logan Township, Gloucester County, New Jersey, Route 130, Lot No. 2, Block No. 1 and Brandywine Hundred, New Castle County, Delaware."

19. Also included in the FOIA response was a copy of a DNREC subaqueous lands lease issued to Keystone/Logan on November 9, 2001, "to maintain two 25 foot by 25 foot mooring dolphins, six 16 foot by 16 foot breasting dolphins, a 70 foot by 105 foot dock, a 22 foot by 450 foot pier, four 4 foot by 109 foot dock sections, two 4 foot by 104.5 foot dock sections, two 2 foot by 4 foot dock sections, and a 10 foot by 10 foot loading platform in the New Castle County, Delaware section of the Delaware River, adjacent to Logan Township, Gloucester County, New Jersey."

Fort Mott

20. Also included in the FOIA response was a copy of a DNREC subaqueous lands lease issued to the State of New Jersey Department of Environmental Protection Division of Parks and Forestry on February 2, 1996, "for the re-construction of a pier to include placement of a barge 30 feet by 100 feet and a pile-supported platform 10 feet by 10 feet on the Delaware River in New Castle County, Delaware, adjacent to New Jersey's Fort Mott State Park, Salem County, New Jersey." The primary purpose of this project was the "[h]istoric restoration of Pier and introduction of ferry service

between Fort Mott and Fort Delaware and Fort DuPont," according to the September 22, 1995 application, which was also included in the FOIA response.

Fenwick Commons

21. Also included in the FOIA response was a copy of a DNREC subaqueous lands lease issued to Fenwick Commons, LLC, on May 10, 2005, "to construct a 40 foot wide by 750 foot long pier, a 6 foot wide by 95 foot long aluminum gangway, a 28 foot wide by 120 foot long floating dock and breakwater, 6 support pilings, 1255 linear feet of steel bulkhead and to fill approximately 1882 square feet of public subaqueous lands at the Penns Grove Riverfront and Pier, end of West Main Street, Penns Grove, New Jersey." Also included was a January 15, 2005 "federal consistency certification" from DNREC indicating that the Fenwick Commons project was consistent with Delaware's coastal zone management plan based upon receipt of a DSLA permit.

22. Also included was a letter dated May 6, 2005 from Warren H. Carr, General Counsel, Fenwick Commons, to John A. Hughes, Secretary, DNREC, enclosing Fenwick Commons' subaqueous lands lease and lease fee, and stating:

> Financing considerations compel us to execute this document, however, with a notation that the issue as to the ownership of lands is in dispute as to the Riparian Grants from the State of New Jersey. We are however, returning the documents in completed form, together with the appropriate fee, in order that we may proceed with the Riverwalk project at Penns Grove, New Jersey. Our position is that we will leave the issue of

> riparian rights and Delaware ownership to be resolved at a different time and in a different form [sic]. We do not acknowledge by this document, the issue of ownership.

This May 6, 2005 letter is attached as **Exhibit M.**

Crown Landing

23. Also included in the FOIA response from DNREC was a copy of Crown Landing's application for a DSLA permit, dated September 27, 2004; a copy of a letter from DNREC to Crown Landing dated October 29, 2004, requesting Crown Landing to withdraw its DLSA permit application until the conclusion of the coastal zone status decision process; a letter dated November 4, 2004, by which Crown Landing withdrew its DLSA permit application; and a letter from DNREC to Crown Landing dated November 5, 2004, indicating that Crown Landing's DSLA application file had been closed.

Allied Chemical

24. Also included in the FOIA response was a copy of an authorization letter dated September 13, 1979 from DNREC to Allied Chemical allowing for the reconstruction and replacement of existing subaqueous lands structures offshore of Claymont, Delaware.

The DCZA Records

25. With regard to permits or applications submitted pursuant to the DCZA, DNREC provided copies of two sets of records.

Appendix 12

26. Specifically, DNREC provided a copy of a DCZA permit issued to Keystone/Logan on December 13, 1991, permitting: "Construction and utilization of a 225 MW cogeneration power plant with pier for off-loading of coal and a water intake structure for the sole use of the power plant."

27. The FOIA response also included a copy of DNREC's Legal Notice acknowledging receipt of a request for a DCZA status decision from Crown Landing and seeking public comments. The application itself was not included. A copy of the DCZA status decision dated February 3, 2005, indicating that Crown Landing's proposed project was prohibited under the DCZA, was also included.

_____/s/_____
Amy C. Donlon
Deputy Attorney General
State of New Jersey
Office of the Attorney General
Department of Law and Public Safety
Division of Law
25 Market Street
Post Office Box 112
Trenton, New Jersey 08625-0093
(609) 633-0651

Subscribed and sworn
to before me this
25th day of July, 2005

_____/s/_____
Ruth M. Wells
Notary Public of the
State of New Jersey

APPENDIX 13 — AFFIDAVIT OF AMY DONLON, EXHIBIT A - FREEDOM OF INFORMATION REQUEST, DATED MAY 17, 2005

STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
25 MARKET STREET
PO BOX 093
TRENTON, NJ 08625-0093

RICHARD J. CODEY
Acting Governor

PETER C. HARVEY
Attorney General

May 17, 2005

Director's Office - FOIA Staff
Attn. Laurie Moyer, Paralegal
Division of Water Resources
Department of Natural Resources & Environmental Control
89 Kings Highway
Dover, DE 19901

Via facsimile at (302) 739-7864 and first class mail

Re: Freedom of Information Act Request

Dear Ms. Moyer:

Pursuant to the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001 *et seq.*, please provide copies of the following documents and records from the Delaware

Appendix 13

Department of Natural Resources & Environmental Control, or allow me to inspect the originals, as soon as possible but no later than within the next 20 business days:

1. All files and documents relating to any subaqueous lands permits applied for, requested by or issued to any person for any activities within the Twelve-Mile Circle around New Castle, Delaware; and

2. All files and documents relating to any coastal zone permits applied for, requested by or issued to any person for any activities within the Twelve-Mile Circle around New Castle, Delaware; and

3. All files and documents relating to Delaware's assertion of jurisdiction over any project or activity appurtenant to the New Jersey shoreline within the Twelve-Mile Circle around New Castle, Delaware, including, but not limited to subaqueous lands and coastal zone regulation.

Please include all documents created through the date of your response. I will pay any copying and administrative fees associated with your response to this request; however, please notify me if those fees will exceed $100.00.

The records should be sent to my attention at the above address. If you are not the appropriate person to process this request, please immediately forward this request to the person(s) who can assist in producing the records.

Appendix 13

If you have any questions regarding this request, please call me at (609) 633-0651. Thank you for your kind attention to this letter.

Sincerely yours,

PETER C. HARVEY
ATTORNEY GENERAL OF NEW JERSEY

By: s/ Amy C. Donlon
Amy C. Donlon
Deputy Attorney General

APPENDIX 14 — AFFIDAVIT OF AMY DONLON, EXHIBIT B - MAY 31, 2005 FREEDOM OF INFORMATION ACT LETTER

STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
25 MARKET STREET
PO BOX 093
TRENTON, NJ 08625-0093

RICHARD J. CODEY
Acting Governor

PETER C. HARVEY
Attorney General

Via facsimile at (302) 577-8500 and (302) 739-6727
Kevin P. Maloney, Deputy Attorney General
State of Delaware, Department of Justice
820 N. French Street
Wilmington, DE 19801

Re: May 17, 2005 Freedom of Information Act Request

Dear Mr. Maloney:

I am in receipt of your letter from today memorializing my agreement to limit the geographic scope of my May 17, 2005 Freedom of Information Act request for records from the Delaware Department of Natural Resources & Environmental Control. As we had discussed, I agree to limit my request to the "New Jersey side" of the Delaware River, i.e., from the main channel of the River to the New Jersey shoreline, within the Twelve-Mile Circle.

Appendix 14

If this is not your understanding of my request, please call me at (609) 633-0651. I will contact you tomorrow at your Dover office to determine the volume of the response to my request. Thank you for your kind attention to this letter.

Sincerely yours,
PETER C. HARVEY
ATTORNEY GENERAL OF NEW JERSEY

BY: s/ Amy C. Donlon
Amy C. Donlon
Deputy Attorney General

cc: Kevin Donnelly, Director; and
Laurie Moyer, Paralegal via facsimile
at (302) 739-7864

APPENDIX 15 — AFFIDAVIT OF AMY DONLON, EXHIBIT C – SEPTEMBER 30, 1957 LETTER FROM MR. SKINNER (DUPONT) TO MR. HABER (DELAWARE STATE HIGHWAY DEPARTMENT)

DUPONT
ESTABLISHED 1802
E. I. DU PONT DE NEMOURS & COMPANY
INCORPORATED
WILMINGTON 98, DELAWARE

LEGAL DEPARTMENT September 30, 1957

Mr. R. A. Haber
Chief Engineer
Delaware State Highway Department
Dover, Delaware

Dear Mr. Haber:

We have filed an application with the United States Corps of Engineers for a permit for the installation of certain facilities in the bed of the Delaware River on the New Jersey side of said River and within the 12-mile circle which delineates the Delaware boundary, and, in a discussion concerning said application, we were informed by Mr. Moritz of the Philadelphia Office of the U. S. Corps of Engineers that if our application were in order the permit would be granted upon our obtaining the prior approval of the State Highway Department of the State of Delaware. This requirement, as I understand, was the result of a request by the State Highway Department of the State of Delaware to the U. S. Corps of Engineers that, before any such permit be granted for installation on Delaware owned land, such approval be required.

Appendix 15

This is a case of first instance with us inasmuch as throughout a long period of years we have made many purchases of land under the waters of the Delaware River, situate within the State of Delaware but on the New Jersey side of the River and within the 12-mile circle, and in some instances we have made installations thereon under proper permits obtained from the U. S. Corps of Engineers without the necessity of obtaining approval by the State of Delaware, it being the position of all parties concerned, until now, that New Jersey was the proper authority with which to deal in connection with such matters on the New Jersey side of the River and within the 12-mile circle, because of the Treaty of 1905 between the State of New Jersey and the State of Delaware, reported at 52 N.J.S.A. 28-34, Article 7 of which reads as follows:

> "Article 7. Each state may on its own side of the River continue to exercise riparian jurisdiction of every kind and nature and to make grants, leases and conveyances of riparian lands and rights under the laws of the respective states".

This treaty was the result of a long-standing conflict between the two states regarding the actual boundary between them and was followed in 1933 by a United States Supreme Court decision in the case: *State of New Jersey v. State of Delaware*, reported in 291 U.S. 361-365, which held, among other things, as follows:

> "Within the 12-mile circle the River and the subaqueous soil thereof up to the low water mark on the easterly or New Jersey side will be adjudged

to belong to the State of Delaware, subject to the Compact of 1905."

It is our opinion that, pursuant to the terms of the above mentioned Treaty of 1905 and the U. S. Supreme Court decision of 1933, the State of New Jersey is the proper authority with which we should deal in connection with any lands lying under the Delaware River within the boundary of the State of Delaware, but on the New Jersey side of the River and within the 12-mile circle.

It would be appreciated if you would review this matter and notify us as soon as possible of the position your Department will take insofar as the present and future similar applications are concerned. It is suggested that in the event it is determined that the State of Delaware has no jurisdiction in such matters, you notify the U. S. Corps of Engineers by letter, with a copy to E. I. du Pont de Nemours and Company, attention of the writer, that the State of Delaware has no jurisdiction over grants that may be made in and to the lands lying under the Delaware River on the New Jersey side thereof and within the 12-mile circle, and that the prior approval of the State of Delaware in such matter is not required.

Yours very truly,

ALAN L. SKINNER
Of Counsel

APPENDIX 16 — AFFIDAVIT OF AMY DONLON, EXHIBIT D – OCTOBER 25, 1957 LETTER FROM MR. HABER TO MR. SKINNER

STATE OF DELAWARE

STATE HIGHWAY DEPARTMENT
P.O. Box 151
DOVER, DELWARE

October 25, 1957

Mr. Alan L. Skinner
E. I. duPont DeNemours & Company
Wilmington, 98, Delaware

Dear Mr. Skinner:

At the October 18th meeting of the State Highway Department, permission was granted to place the new outfall from the Deep-water Plant. This approval is in accordance with the present policy of the State Highway Department.

The Department further directed that your letter of September 30th be forwarded to our Attorney, and that he be asked to contact you directly to determine if possible the future status of such requests.

Very truly yours,

/s/

R. A. Haber
Chief Engineer

cc:
S. Samuel Arsht, Esq.
Corps of Engineers

APPENDIX 17 — AFFIDAVIT OF AMY DONLON, EXHIBIT E – DECEMBER 2, 1957 LETTER FROM S. SAMUEL ARSHT, ESQ., TO MR. HABER

MORRIS, STEEL, NICHOLS & ARSHT
3018 DuPont Building
Wilmington1, Delaware

December 2, 1957

Mr. R. A. Haber
Chief Engineer
State Highway Department
P.O. Box 151
Dover, Delaware

Dear Mr. Haber:

This will acknowledge receipt of a copy of your letter of October 25, 1957 to Mr. Alan L. Skinner of the DuPont Company (a copy of which went to me and the Corps of Engineers) in which you stated that at the October 18th meeting of the State Highway Department permission was granted to place the new outfall from the Deepwater Plant and that such approval is in accordance with the present policy of the State Highway Department. You also stated in your letter that I had been requested by the Department to contact Mr. Skinner directly to determine, if possible, the future status of similar requests.

I have considered Mr. Skinner's letter to you of September 30, 1957 in which he refers to the Treaty of 1905 between New Jersey and Delaware and to the decision of the United States Supreme Court of 1933 in the case of *State of New Jersey v. State of Delaware*, reported in 291 U.S. 361-5.

Appendix 17

I concur in Mr. Skinner's opinion that, pursuant to the terms of the Treaty of 1905 and the United States Supreme Court decision of 1933, the State of New Jersey is the proper authority with which the DuPont Company should deal in connection with any lands lying under the Delaware River within the boundary of the State of Delaware, but on the New Jersey side of the river and within the twelve-mile circle.

In view of my concurrence in Mr. Skinner's opinion regarding the jurisdiction of the State of Delaware, I suggest that the State Highway Department notify the U.S. Corps of Engineers by letter, with a copy to E.I. duPont de Nemours & Company, attention Mr. Alan L. Skinner, Legal Department, that the State of Delaware has no jurisdiction over grants that may be made in and to the lands lying under the Delaware River on the New Jersey side thereof and within the twelve-mile circle, and that the prior approval of the State of Delaware in such matters is not required.

Very truly yours,

/s/

S. SAMUEL ARSHT

cc: Alan L. Skinner, Esquire

APPENDIX 18 — AFFIDAVIT OF AMY DONLON, EXHIBIT F - DECEMBER 13, 1957 LETTER FROM MR. HABER TO U.S. ARMY CORPS OF ENGINEERS

December 13, 1957

U.S. Army, Corps of Engineer
Office of the District Engineer
Philadelphia District
P.O. Box 8629
Philadelphia, Pa.

Gentlemen:

At the December 11th meeting of the Delaware State Highway Department it was determined that the Corps of Engineers be requested to continue to supply the Delaware State Highway Department with information regarding proposed work in, on, or under the Delaware River on the New Jersey side provided, however, that no permit of the Corps of Engineers be held up or otherwise delayed by failure of the Delaware State Highway Department to act upon it.

If any work is contemplated or requested on the Delaware side, then, of course, no permits should be issued without approval of the Delaware State Highway Department.

Your cooperation in keeping us supplied with the information on the proposed work will be very much appreciated.

Very truly yours,

R.A. Haber
Chief Engineer

cc:
Mr. Hugh B. Sharp, Jr.
Mr. Joe S. Robinson
Mr. Samuel S. Arsht

APPENDIX 19 — AFFIDAVIT OF AMY DONLON, EXHIBIT G - JANUARY 8, 1958 LETTER FROM S. SAMUEL ARSHT, ESQ., TO MR. SKINNER

LAW OFFICES
OF
MORRIS, STEEL, NICHOLS & ARSHT
Du Pont Building
Wilmington1, Delaware

January 8, 1958

Alan L. Skinner, Esquire
E. I. du Pont de Nemours & Co.
Legal Department
DuPont Building
Wilmington, Delaware

Dear Alan:

In accordance with our telephone conversation of this morning, I enclose herewith a copy of a letter dated December 13, 1957 from Mr. R. A. Haber, Chief Engineer of the Highway Department, to the Corps of Engineers, United States Army, that was written pursuant to the following resolution adopted by the Highway Department at its meeting held on December 11, 1957:

> "On motion duly made, seconded and carried, the Department, taking cognizance of the above opinion (of S. Samuel Arsht, Department Attorney, to Mr. R. A. Haber, Chief Engineer, dated December 2, 1957), directed the Chief Engineer to notify the Corps of Engineers, U.S. Army, that

while the Department has no jurisdiction over the area mentioned, the Department wishes to be notified of all permits requested and granted."

Very truly yours,

/s/

S. SAMUEL ARSHT

Enc.

APPENDIX 20 — AFFIDAVIT OF AMY DONLON, EXHIBIT H - FEBRUARY 10, 1971 LETTER FROM MR. SKINNER TO JOHN C. BRYSON

DU PONT
E.I. DU PONT DE NEMOURS & COMPANY
INCORPORATED 1802
WILMINGTON, DELAWARE 19898

cc: Mr. F.J. Kelly,
Assistant Chief
Department of Environmental
Protection
Division of Natural Resources
Bureau of Navigation
P.O. Box 1889
Trenton, New Jersey 08625

February 10, 1971

LEGAL DEPARTMENT

REGISTERED MAIL
RETURN RECEIPT REQUESTED

Mr. John C. Bryson
Director of Environmental Control Division
Department of Natural Resources of the
State of Delaware
Dover, Delaware 19901

Re: Permit Application to construct fuel oil storage tank on underwater lands within the State of Delaware at Deepwater Point, New Jersey

Appendix 20

Dear Mr. Bryson:

As I informed you in our telephone conversation of February 9, 1971, we applied to the Corps of Engineers for the above named permit and as a result of such application your Mr. B. E. Lane, Staff Geohydrologist, notified both the Corps of Engineers and our Chambers Works personnel that a permit from the State of Delaware would be necessary and that the project falls within the terms of a moratorium placed on subaqueous lands projects by the Delaware Legislature. We question the jurisdiction of the State of Delaware in this matter.

This question of jurisdiction is not new to us, having been raised in 1957 by R. A. Haber, Chief Engineer of the Delaware State Highway Department. At that time, it was determined that the State of Delaware had no jurisdiction in such matters on the easterly side of the Delaware River.

As background information I am enclosing photocopies of the following letters:

1. Letter dated January 29, 1971 addressed to Mr. P. H. Collins of our Chambers Works by B. E. Lane, Staff Geohydrologist, Water Resources and Subaqueous Lands.

2. Letter dated January 29, 1971 addressed to Colonel Carroll D. Strider, District Engineer, Corps of Engineers by B. E. Lane, Staff Geohydrologist, Water Resources and Subaqueous Lands.

Appendix 20

3. Letter dated September 30, 1957 addressed to R. A. Haber, Chief Engineer of the Delaware State Highway Department by the undersigned.

4. Letter dated October 25, 1957 addressed to the undersigned by R. A. Haber, Chief Engineer of the Delaware State Highway Department.

5. Letter dated December 2, 1957 addressed to Mr. R. A. Haber, Chief Engineer of the Delaware State Highway Department by S. Samuel Arsht, Attorney for the Delaware State Highway Department.

6. Letter dated December 13, 1957 addressed to the United States Army, Corps of Engineers by R. A. Haber, Chief Engineer of the Delaware State Highway Department.

7. Letter dated January 8, 1958 addressed to the undersigned by S. Samuel Arsht, Attorney for the Delaware State Highway Department.

The question was finally resolved on December 11, 1957, by the passage of a resolution by the Delaware State Highway Department directing its Chief Engineer to notify the Corps of Engineers, United States Army that while the Department has no jurisdiction over the area mentioned, the Department wishes to be notified of all permits requested and granted. In my opinion, the language of the 1905 Treaty as confirmed by the decision of the United States Supreme Court will permit no other conclusion. Certainly the unilateral passage of legislation in Delaware or the creation of a new department in charge of subaqueous lands could not change the Treaty.

or alter the court decision so as to affect the division of jurisdiction between the two states.

As I stated to you the moratorium passed by the Delaware Legislature cannot in any event apply to the easterly side of the river, since that statute is limited to the area "between the high and low water marks along the Delaware River and Bay within the State of Delaware." There is no land on the easterly side of the river between the high and low water marks within the State of Delaware.

Our people are very anxious to move on the proposed project. It is immaterial to us whether we get a permit from the State of Delaware or the State of New Jersey, provided it is obtained from the state that actually has jurisdiction of the subject matter, which we believe to be New Jersey.

As you offered to do, it would be appreciated if you would submit this question to the Attorney General of the State of Delaware.

Very truly yours,

s/ Alan L. Skinner
Alan L. Skinner

APPENDIX 21 — AFFIDAVIT OF AMY DONON, EXHIBIT I – JUNE 7, 1971 LETTER FROM E.T. FOGG TO MR. B. E. LANE

DuPONT
Established 1802
E. I. du Pont de Nemours & Company
Incorporated

Chambers Works
Deepwater, New Jersey 08023

Telephone
Area Code 609-299-5000

June 7, 1971

State of Delaware
Water and Air Resources Commission
Water Resources Division
Dover, Delaware 19901

Attention Mr. B. E. Lane, Staff Geohydrologist
Water Resources and Subaqueous Lands

Gentlemen:

Reference E.T. Fogg's letter to B. E. Lane of May 12, 1971, describing the proposed tanker unloading and oil storage facility which Du Pont wishes to construct at its Chambers Works plant located at Deepwater, New Jersey. Enclosed herewith are three completed copies of form WRD-3, 7/69 *Application for State Approval of a Subaqueous*

Lands Project for the proposed facility, and Du Pont Check No. 008-650 in the sum of $25 to cover the application fee.

As you know, the proposed facility, with the exception of a small area to be dredged, will be constructed on subaqueous land which the Du Pont Company has purchased from the State of New Jersey. It is Du Pont's position that the 1905 Treaty between New Jersey and Delaware ceded to the State of New Jersey full authority over subaqueous lands from the New Jersey shore to the center of the Delaware River, including the right to convey title to such lands; and that the subsequent Supreme Court cases did not, and in fact could not, modify the terms of said Treaty. It was in reliance on the Treaty that the Du Pont company purchased the lands in question from the State of New Jersey in 1916. The charges for dredging and filling listed under Item H of the aforesaid application form would compel the Du Pont Company to pay for lease back land which the Company had previously purchased and holds title to under the deeds attached.

We recognized that the State of Delaware's position is that *State of New Jersey v. State of Delaware*, 291 U.S. 361 (1934), conclusively established Delaware's title to the Delaware River and its subaqueous soil up to the mean low water mark on the easterly (New Jersey) side. The application is therefore filed with the understanding that such filing is without prejudice to either Du Pont or the State of Delaware with regard to any questions that might arise as to the adequacy of Du Pont's title, and that payment of dredging and lease charges shall be reserved. The Du Pont Company agrees to pay to the State of Delaware the application for a permit fee of $25 now, and any charges that might be lawfully

due by reason of subject project in the event it is determined at some future date by a court of competent jurisdiction that Delaware's title to the land in question is superior to that of Du Pont's.

We trust that our application is now in order and will be considered by the Water and Air Resources Commission at a special hearing as soon as possible. Feel free to give me a call (AC 609-299-5000 Extension 440) if you should have any questions with regard to this matter.

Very truly yours

/S/

E.T. Fogg
Works Engineer

Enclosures 3 - Completed Form WRD-3, 7/69
1 - Du Pont Check No. 008-650
1 - Copy of Deeds

cc: Mr. J. Bryson
Richard H. Schliem, 3rd, Esquire

APPENDIX 22 — AFFIDAVIT OF AMY DONLON, *EXHIBIT J - 1971 LEASE GRANTED TO DUPONT BY DNREC*

SL-558/1971

LEASE GRANTED TO

E. I. DU PONT DE NEMOURS AND COMPANY

TO

DREDGE, CONSTRUCT A BULKHEAD, FILL BEHIND SAID BULKHEAD, CONSTRUCT A DOCK, AND CONSTRUCT A FUEL OIL STORAGE TANK AT ITS "CHAMBERS WORKS" FACILITY ALONG THE DELAWARE RIVER

AND NOW, to wit, this _____ day of _____, A.D. 1971, the State of Delaware (hereinafter referred to as Lessor) does hereby accept the June 21, 1971, resolution of the Water and Air Resources Commission approving the application of E. I. du Pont de Nemours and Company (hereinafter referred to as Lessee) submitted to the Water and Air Resources Commission and dated June 7, 1971, a copy of which is attached hereto and made a part hereof; and

WHEREAS, Lessor claims title to certain subaqueous lands lying beneath the waters of the Delaware River, the subject matter of this lease; and

WHEREAS, Lessee also claims title to the same subaqueous lands;

Appendix 22

WHEREAS, the granting of this lease is necessary for the construction of certain storage facilities which are necessary for the use of low sulphur fuel, an environmentally desirable goal;

It is understood by both parties to this agreement that both the application for this lease and the granting of this lease are filed and granted without prejudice to the title claim of either party; and

WHEREAS, Lessee, owner of certain lands referred to as the "Chambers Works" and adjacent to the Delaware River, has applied for permission to dredge, construct a bulkhead, fill behind said bulkhead, construct a dock, and construct a fuel oil storage tank on the subaqueous lands adjacent to the "Chambers Works"; and

WHEREAS, pursuant to the provisions of Title 7, Part VII, Section 6451, Delaware Code, the Water and Air Resources Commission finds that it is not contrary to the public interest, and that the granting of this lease is hereby approved subject to the terms and conditions herein set forth.

NOW, THEREFORE, Lessor hereby grants permission to the Lessee to dredge from the Delaware River approximately sixty thousand (60,000) cubic yards of subaqueous material;

AND, to construct approximately nine hundred (900) feet of bulkhead;

Appendix 22

AND, to fill approximately thirty thousand six hundred forty-seven (30,647) square feet of subaqueous land behind said bulkhead;

AND, to construct a six (6) foot by ten (10) foot dock;

AND, to construct a two hundred thousand (200,000) barrel fuel oil storage tank, part of which will be constructed on the aforementioned subaqueous lands, all in accordance with the plans submitted, drawings DWM-1655, DW-22779, DW-22780, and DW-23045, copies of which are attached hereto and become a part hereof;

AND, hereby leases to Lessee the approximately thirty thousand six hundred forty-seven (30,647) square feet of subaqueous land to be filled and the approximately sixty (60) square feet of subaqueous land upon which the six (6) foot by ten (10) foot dock is to be constructed.

THIS lease and authorization shall be continued for a period of ten (10) years beginning the _____ day of _____, 1971, or so long as the conditions attached to the lease are adhered to, whichever is the shorter in time. Upon the expiration of the ten-year term, this lease shall expire and become null and void, unless prior thereto Lessee shall have applied for and received a renewal of this lease. A renewal may be denied if Lessor determines that the lease is no longer in the public interest.

Appendix 22

THIS lease shall be subject to the following conditions:

1. The Lessee agrees to pay the Lessor, subject to the terms of paragraph 1(a) below, thirty thousand dollars ($30,000.00) for the approximately sixty thousand (60,000) cubic yards of subaqueous material to be dredged, thirty thousand six hundred forty-seven dollars ($30,647.00) for a ten-year lease for the approximately thirty thousand six hundred forty-seven (30,647) square feet of subaqueous land to be filled, and an annual rental charge of sixty dollars ($60.00) for a ten-year lease for the approximately sixty (60) square feet of subaqueous land upon which a six (6) foot by ten (10) foot dock is to be constructed.

1(a) Lessee agrees to pay Lessor the amounts, with 6% annual interest from the date of this agreement, as scheduled in the preceding paragraph in the event that the disputed title to the subaqueous lands in question is resolved in favor of Lessor at some future date under a final judgment of a federal court of competent authority. Lessor agrees to defer the collection of the fees, herein referred to, until the title question is resolved as herein agreed.

2. The bulkhead is to be completed prior to any filling of lands contained by said bulkhead.

3. The project is to be undertaken in accordance with the plans submitted. If changes are necessary, revised plans must be submitted and a supplemental approval issued prior to actual construction.

Appendix 22

16. This lease is void if the project has not been initiated by one (1) year from the date of issuance.

17. This lease will be revoked upon violation of any of the above conditions.

IN WITNESS WHEREOF, E. I. du Pont de Nemours and Company has caused this instrument to be executed and its corporate seal affixed by its respective proper officers thereunto duly authorized on this the day and year first above written.

E. I. DU PONT DE NEMOURS AND COMPANY

By /S/

ATTEST:

/S/
Assistant Secretary

IN WITNESS WHEREOF, I /S/, Chairman of the Delaware Water and Air Resources Commission have hereunto set my hand and seal this 17th day of September, 1971.

(SEAL)
By Chairman of Delaware Water and Air Resources Commission

Appendix 22

IN WITNESS WHEREOF, I, RUSSELL W. PETERSON, Governor of the State of Delaware, have hereunto set my hand and the Great Seal of the State of Delaware has been hereunto affixed by the Secretary of State, at Dover, on this 29th day of September in the year of Our Lord One Thousand Nine Hundred and Seventy-one.

/S/ _____ ___ _____
By The Governor

/S/ _ _____ ___ ____
By the Secretary of State

APPENDIX 23 — AFFIDAVIT OF AMY DONLON, EXHIBIT K - OCTOBER 23, 1981 LETTER FROM DELAWARE DAG MacARTOR TO MR. SKINNER

State of Delaware
DEPARTMENT OF JUSTICE
Tatnall Building
P. O. Box 1401
Dover, De. 19901

RICHARD S. GEBELEIN
ATTORNEY GENERAL

736-4636

October 23, 1981

Alan L. Skinner, Esq.
Legal Department
E. I. duPont deNemours & Co.
1007 Market Street
Wilmington, Delaware 19898

Re: Lease No. SL558/1971

Dear Mr. Skinner:

The lease between the duPont Company and the State of Delaware for subaqueous lands beneath the waters of the Delaware River has been referred to me by the Department of Natural Resources and Environmental Control. The terms of the lease include a phrase that your payments will become due and payable when the disputed title to the subaqueous lands is resolved in favor of Lessor under a final judgment of a federal court of competent authority. I think that you will agree that a federal court of competent jurisdiction has

ruled on the subject of the boundary between New Jersey and Delaware. See *New Jersey v. Delaware*, 295 U.S. 694 (copy attached). The court determined that the boundary was the mean low water line on the easterly or New Jersey side.

Please regard this as your official notification that the $60,647.00 plus 6% interest from September 29, 1971 is presently due and owing. May we please receive your check for this amount payable to the State of Delaware.

Thank you for your consideration.

Sincerely,

/s/

June D. MacArtor
Deputy Attorney General

APPENDIX 24 — AFFIDAVIT OF AMY DONLON, EXHIBIT L - OCTOBER 27, 1981 LETTER FROM MR. SKINNER TO DELAWARE DAG MacARTOR

DuPONT
ESTABLISHED 1802
E. I. DU PONT DE NEMOURS & COMPANY
INCORPORATED

WILMINGTON, DELAWARE 19898

LEGAL DEPARTMENT October 27, 1981

June D. MacArtor, Esq.
Deputy Attorney General
Department of Justice
State of Delaware
Tatnall Building
P. O. Box 1401
Dover, Delaware 19901

Dear Ms. MacArtor:

Lease No. SL 558/1971

I agree that the two cases, *New Jersey v. Delaware*, 291 U.S. 361 (1933), and *New Jersey v. Delaware*, 295 U.S. 694 (1935), determined that the boundary between New Jersey and Delaware within the 12-mile circle was the low water mark on the New Jersey side; however, the actual holding of the Court was as follows:

> "Within the 12-mile circle the river and subaqueous soil thereof up to low water mark on

the easterly or New Jersey side will be adjudged to belong to the State of Delaware, subject to the Compact of 1905."

The question at the time of the execution of the 1971 lease was the effect of the Compact of 1905. There has been no final judgment of a Federal Court of competent jurisdiction since 1971 determining this matter as required in the lease.

Pursuant to our telephone conversation of yesterday and for your information I have enclosed the following:

1. Copy of letter dated September 30, 1957, addressed by me to Mr. R. A. Haber, Chief Engineer of the Delaware State Highway Department.

2. Copy of letter dated October 25, 1957, addressed to me by R. A. Haber, Chief Engineer.

3. Copy of letter dated December 2, 1957, addressed to Mr. R. A. Haber, Chief Engineer, by S. Samuel Arsht.

4. Copy of letter dated December 13, 1957, addressed by R. A. Haber, Chief Engineer, to the U.S. Army Corps of Engineers.

5. Copy of letter dated January 8, 1958, addressed to me by S. Samuel Arsht.

Appendix 24

6. A copy of my opinion as to the intention and meaning of the Compact of 1905.

It is my opinion that New Jersey has jurisdiction over the matters covered by the 1971 lease as previously agreed to by S. Samuel Arsht, Esq., and the Delaware State Highway Department.

Your comments would be appreciated.

Yours very truly,

/S/

Alan L. Skinner

Enclosures

APPENDIX 25 — AFFIDAVIT OF AMY DONLON, EXHIBIT M - MAY 6, 2005 LETTER FROM WARREN H. CARR, ESQ., TO JOHN A. HUGHES, SECRETARY, DNREC

CRESSE AND CARR
COUNSELLORS AT LAW
39 COOPER STREET
P.O. BOX 357
WOODBURY, NEW JERSEY 08096

856-845-0037

May 6, 2005

FEDEXED 5/6/05
John A. Hughes, Secretary
Depart. Of Natural Resources and
Environmental Control
Division of Water Resources
Wetlands & Subaqueous Lands Section (WSLS)
89 Kings Highway
Dover, Delaware 19901

RE: Application of Fenwick Commons, L.L.C.
Subaqueous Lands Lease No. SL-312/04
Water Quality Certification: WQC-313/04

Dear Mr. Hughes:

Enclosed is the Subaqueous Lands Lease/Water Quality Certification for Fenwick Commons, L.L.C., together with a copy of your letter [not dated] for purposes of your identification. The document has been executed before a

Notary Public of the State of New Jersey, and is being returned with the Lease fee in the amount of $1,000.00 pursuant to your instructions.

Financing considerations compel us to execute this document, however, with a notation that the issue as to the ownership of lands is in dispute as to the Riparian Grants from the State of New Jersey. We are however, returning the documents in completed form, together with the appropriate fee, in order that we may proceed with the Riverwalk project at Penns Grove, New Jersey.

Our position is that we will leave the issue of riparian rights and Delaware ownership to be resolved at a different time and in a different form. We do not acknowledge by this document, the issue of ownership.

Very truly yours,
/s/
Warren H. Carr
General Counsel

Encl. [3 original Lease Documents
Check - $1,000.00]

APPENDIX 26 — DECLARATION OF LAUREN B. SEGAL, DATED JUNE 27, 2005

IN THE SUPREME COURT OF THE UNITED STATES

No. 11, Orig.

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF DELAWARE,

Defendant.

DECLARATION OF LAUREN B. SEGAL

I, Lauren B. Segal, declare that the following facts are true to the best of my knowledge, information and belief:

1. I am the Vice-President of Crown Landing LLC ("Crown Landing"). Crown Landing is an affiliate of BP America, Inc. ("BP"). I am authorized to execute this Declaration on behalf of Crown Landing and I have personal knowledge of the facts stated herein.

THE PROJECT

2. On September 16, 2004, Crown Landing submitted to the Federal Energy Regulatory Commission ("FERC") an application pursuant to § 3 of the Natural Gas Act to construct

and operate a liquefied natural gas ("LNG") import terminal and re-gasification facility in Logan Township, New Jersey (the "Project"). The Project will be able to deliver a baseload rate of 1.2 billion cubic feet per day of re-gasified LNG to the interstate natural gas pipeline system and will provide a new and reliable source of natural gas for the Mid-Atlantic region, including the States of New Jersey, Delaware, Pennsylvania, New York, and Maryland. The supply is likely to reach other regions through the interstate pipeline grid.

3. Crown Landing is seeking to build this Project to meet the rising domestic demand for natural gas for which current domestic supply sources will not be adequate. *See* Energy Information Administration, *Annual Energy Outlook 2005*, p.6 (DOE/EIA-0383) (February 2005) (available at www.eia.doe.gov/oiaf/aeo/). New sources of natural gas and LNG are particularly needed in the Mid-Atlantic region, where the demand for natural gas is projected to increase significantly over the next two decades. *See* Energy Information Administration, *Supplemental Tables to the Annual Energy Outlook 2005*, Table 2, Energy Consumption by Source and Sector (Middle Atlantic), (February 2005) (available at http://www.eia.doe.gov/ oiaf/aeo/supplement/ suptab_2.xls).

THE PIER IN THE DELAWARE RIVER APPURTENANT TO THE NEW JERSEY SHORELINE

4. The LNG terminal and re-gasification facility will be located entirely within the State of New Jersey. However, the Project also depends on critical riparian facilities located

on the New Jersey side of the Delaware River within the twelve-mile circle around New Castle, Delaware. The 50-foot wide pier will extend from the New Jersey shoreline approximately 2,000 feet beyond the mean low water mark, which constitutes the boundary line between Delaware and New Jersey. It will consist of a single berth designed to accommodate LNG tankers ranging in size from 138,000 to 200,000 cubic meters in capacity. The berth will be oriented perpendicular to, but will not extend into, the shipping channel. Construction of the pier will require dredging of approximately 800,000 cubic yards of sediment to provide the berth with adequate water depths for vessels to reach the navigable channel of the Delaware River.

FEDERAL PERMITS

5. On February 18, 2005, FERC, as the lead federal agency, in cooperation and coordination with the U.S. Army Corps of Engineers, U.S. Coast Guard, U.S. Environmental Protection Agency, and the National Oceanic and Atmospheric Administration, issued a draft Environmental Impact Statement for the Project, pursuant to the National Environmental Policy Act (the "Draft EIS"). The Draft EIS spanned hundreds of pages and considered a multitude of factors. It proposed a number of measures to avoid, minimize or mitigate environmental impacts from the construction and operation of the Project. The Draft EIS concluded that, if constructed and operated in accordance with those proposed measures, the Project would have limited adverse

environmental impacts and "the risk to the public from accidental causes should be considered negligible."[1]

6. The Draft EIS stated that, because the pier will extend into the Delaware River across the boundary line into Delaware, Crown Landing will be required to obtain concurrence from the Delaware Department of Natural Resources and Environmental Control ("DNREC") that the Project is consistent with the Delaware Coastal Management Plan.[2] The Draft EIS also stated that, "[b]ecause the Crown Landing LNG Project would involve construction of a new pier and other facilities within Delaware's coastal zone to convey LNG from ships to the terminal, a determination on whether the facilities would be a permissible use under the DSCZA [Delaware State Coastal Zone Act] is required."[3]

7. In addition to approval from FERC under § 3 of the Natural Gas Act, Crown Landing requires federal permits issued by the U.S. Army Corps of Engineers pursuant to § 10 of the Rivers and Harbors Act, and § 404 of the Clean Water Act. Crown Landing submitted its application for those permits on January 31, 2005. On March 17, 2005, the U.S. Army Corps of Engineers, Philadelphia District ("COE") advised Crown Landing of its "responsibility to obtain State

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[1] Draft Environmental Impact Statement, Crown Landing LNG and Logan Lateral Projects at 5-1, Docket Nos. CP04-411-000 and CP04-416-000 (Feb. 18, 2005).

[2] *Id.* at 4-92.

[3] *Id.*

approval and water quality certification from the New Jersey Department of Environmental Protection, Land Use Regulation Program . . . and from Delaware Department of Natural Resources and Environmental Control." On March 18, 2005, the COE stated in its Public Notice that "Department of the Army permits will be granted unless the District Engineer determines that they would be contrary to the public interest."

8. On April 18, 2005, the New Jersey Board of Public Utilities advised FERC, in the letter attached as Exhibit 4, that it supported the Project. Provided all environmental and safety concerns were addressed, the Board said, the Project would "play an important part in ensuring a competitive and reliable supply of natural gas to New Jersey's and the region's energy customers." The Board noted that "this State has seen a steep increase in the price of natural gas, and it is our hope and expectation that this proposed LNG facility will help stabilize the cost of energy."

DELAWARE'S ACTIONS BLOCKING THE PROJECT

9. DNREC advised Crown Landing in 2004 that construction of the pier facilities appurtenant to the New Jersey shoreline would require permits from the State of Delaware pursuant to the Delaware Coastal Zone Act, Del. Code Ann. tit. 7, § 7004 (2005), and the Delaware Subaqueous Lands Act, Del. Code Ann. tit. 7, § 7205 (2005).

Appendix 26

The Delaware Subaqueous Lands Permit

10. On September 27, 2004, Crown Landing submitted to DNREC an application for a Delaware Subaqueous Lands permit in order to gather samples from the riverbed at the site of the proposed pier. The sampling was needed to determine the characteristics of the sediment that would be dredged from the pier and berthing area as requested by New Jersey DEP and to facilitate the design of the pier and bulkhead.

11. On October 29, 2004, in the letter attached as Exhibit 1, DNREC formally requested Crown Landing to withdraw its application for the Subaqueous Lands permit. DNREC stated:

> [W]e cannot make a decision on your application until a determination has been made regarding whether construction of an LNG storage facility is an activity permissible in Delaware's coastal zone.
>
> Accordingly, we are requesting that you withdraw your subaqueous lands permit application ... until the conclusion of the coastal zone status decision process.

12. On November 4, 2004, Crown Landing acceded to DNREC's request and withdrew its Subaqueous Lands permit application.

Appendix 26

The Delaware Coastal Zone Act Permit

13. The Delaware Coastal Zone Act ("DCZA") states that certain uses are "absolutely prohibited" in the Delaware coastal zone. Del. Code Ann. tit. 7, § 7003 (2005). That prohibition apples to "[h]eavy industry uses of any kind" as well as any "offshore gas, liquid or solid bulk product transfer facilities" that were "not in operation on June 28, 1971." *Id.*

14. On December 7, 2004, Crown Landing submitted to John A. Hughes, the Secretary of the DNREC, a request for a status decision that the Crown Landing pier was permitted by the DCZA.

15. On February 3, 2005, Secretary Hughes advised Crown Landing, in the letter attached as Exhibit 2, that the Project represented an "offshore bulk transfer facility" as well as a "heavy industry use" that are both prohibited under the DCZA. He also concluded — with reference to structures to be located entirely within the State of New Jersey — that "the on-shore storage tanks essential to the operation of the facility are prohibited structures."

16. Secretary Hughes recognized the benefits of the Project but stated that his adverse determination did not go to the merits of the facility:

> This decision does not come without some appreciation of the need for additional natural gas supplies in this country nor the relative cleanliness of natural gas compared to other energy fuels. Despite the benefits that increased LNG imports

> might bring, placement of this facility within the boundary of Delaware is, in my opinion, clearly a prohibited use within Delaware's coastal zone. *Id.*

17. Crown Landing appealed Secretary Hughes' adverse determination to the State Coastal Zone Industrial Control Board ("Industrial Control Board"), pursuant to Del. Code Ann. tit. 7, § 7007 (2005). On March 30, 2005, the Industrial Control Board conducted a hearing on the appeal and voted unanimously to affirm the Secretary's decision.

18. On March 31, 2005, DNREC Secretary Hughes advised FERC, in the letter attached as Exhibit 3, as follows:

> We believe very strongly that our state Coastal Zone Act applies in this instance and that no mitigating measure or response actions exist that FERC or BP can take to reverse or alter our position with respect to the facility as planned on this site.
>
> This project is clearly a prohibited activity under Delaware law and we would request that FERC and BP act accordingly.

19. An appeal can be taken to the Superior Court for the State of Delaware from an adverse decision of the Industrial Control Board. Del. Code Ann. tit. 7, § 7008 (2005). However, any such appeal is statutorily limited, "the only issue being whether the Board abused its discretion in applying standards set forth by this chapter and regulations issued pursuant thereto to the facts of the particular case."

Id. Based on the advice of experienced Delaware counsel that an appeal of the Industrial Control Board's adverse determination would be futile under the standard set forth in § 7008, Crown Landing declined to pursue an appeal.

20. Officials of the State of New Jersey have recently informed Crown Landing that New Jersey objects to the efforts of the State of Delaware to apply its permitting requirements to this Project. On May 24, 2005, the New Jersey Department of Environmental Protection ("NJDEP") specifically notified Crown Landing in the letter attached as Exhibit 5 as follows:

> As State officials have made clear, . . . although a portion of the pier is proposed to be in Delaware, construction of the entire pier, and any associated dredging, is subject to New Jersey's exclusive review and permitting authority, and not that of Delaware. This is the case because the Compact of 1905 between New Jersey and Delaware, which was approved by the Legislatures of both States and by the United States Congress, gives New Jersey exclusive riparian jurisdiction of every kind and nature on its side of the Delaware River.

21. On May 26, 2005, Crown Landing advised FERC that, notwithstanding DNREC's decision withholding a DCZA permit, Crown Landing intended to pursue the Project as filed with FERC. Crown Landing further advised FERC that it was its understanding that New Jersey would undertake whatever appropriate action is necessary to confirm that Delaware lacks the authority to require any Delaware permits

for the Project. Accordingly, Crown Landing requested FERC to approve the Project subject to the resolution of any outstanding controversy between New Jersey and Delaware concerning Delaware's claimed permitting authority.

SUMMARY

22. Because the Project received a favorable Draft EIS, and because Crown Landing has not been advised of any insurmountable impediment to the issuance of the necessary federal permits, Crown Landing fully anticipates receiving all federal permits required for the Project. However, some of those federal authorizations will be conditioned on obtaining all required State permits, and the State of Delaware has refused to issue Delaware state permits that Delaware insists are required for construction of the Project. Because Delaware imposes civil and criminal sanctions on anyone who conducts activities in Delaware waters without the required permits mentioned above, Crown Landing will be unable to undertake the necessary work unless New Jersey prevails in this litigation.

23. Crown Landing is not, and has never been, a party to any proceeding in which it has attempted to obtain a ruling concerning New Jersey's rights under the Compact of 1905. Given Delaware's determination that the Project is absolutely prohibited by the Delaware Coastal Zone Act, Crown Landing is awaiting the outcome of this case to resolve whether Delaware has any riparian jurisdiction over the Project.

I declare under penalty of perjury of the laws of the United States that the foregoing facts are true and correct.

Appendix 26

Executed on: June 27, 2005

_____/s/_____ _____
LAUREN B. SEGAL

EXHIBITS TO DECLARATION OF LAUREN B. SEGAL

1. Letter from Herr to Segal of 10/29/2004
2. Letter from Hughes to Segal of 2/3/2005
3. Letter from Hughes to Salas of 3/31/2005
4. Letter from Fox, et al., to Salas of 4/18/2005
5. Letter from Seebode to Blaha of 5/24/2005

APPENDIX 27 — DECLARATION OF LAUREN B. SEGAL, EXHIBIT 1, DATED OCTOBER 29, 2004

STATE OF DELAWARE
DEPARTMENT OF NATURAL RESOURCES &
ENVIRONMENTAL CONTROL
DIVISION OF WATER RESOURCES
89 KINGS HIGHWAY
DOVER, DELAWARE 19901

Wetlands and Subaqueous Lands Section

Telephone 302/739-4691
Facsimile 302/739-6304

October 29, 2004

Lauren Segal
BP Crown Landing, LLC
501 West Lake Park Blvd
Houston, TX 77079

RE: Subaqueous Lands Permit Application No. SP-389/04 for BP Crown Landing, LLC

Dear Ms. Segal:

After reviewing the above-referenced permit application and considering public comments received during the public notice process, we have determined that we cannot make a decision on your application until a determination has been made regarding whether construction of an LNG storage facility is an activity permissible in Delaware's coastal zone.

Accordingly, we are requesting that you withdraw your subaqueous lands permit application to perform 19

geotechnical test borings until the conclusion of the coastal zone status decision process. If the proposed LNG storage and transfer activities are determined to be ones that are permissible in the coastal zone, the application for the test borings can be re-submitted at that time.

If you should have any questions regarding this matter, please feel free to contact me at 302/739-4691.

Sincerely,

/s/

Laura M. Herr
Program Manager
Wetlands and Subaqueous Lands Section

cc: Pete Swinick, Golder Associates, Inc.
John A. Hughes, Secretary, DNREC
Kevin C. Donnelly, Director,
Division of Water Resources

APPENDIX 28 — DECLARATION OF LAUREN B. SEGAL, EXHIBIT 2, DATED FEBRUARY 3, 2005

STATE OF DELAWARE
DEPARTMENT OF NATURAL RESOURCES
AND ENVIRONMENTAL CONTROL
89 Kings Highway
Dover, Delaware 19901

OFFICE OF THE
SECRETARY

PHONE: (302) 739-4403
FAX: (302) 739-6242

February 3, 2005

Ms. Lauren Segal
Vice President
Crown Landing LLC
501 West Lake Park Blvd.
Houston, TX 77079

Re: Coastal Zone Act Status Decision

Dear Ms. Segal:

Based on the public comments, the assessment and recommendations of DNREC staff, and discussions with our legal representatives, I have reached a decision on your application for a coastal zone status request.

I find that your proposed facility represents a prohibited offshore bulk product transfer facility and does not meet the exemption under the bulk product transfer facility definition in that the facility cannot be considered a "manufacturing use" under the Act. Furthermore, I conclude that this facility,

as proposed, exhibits characteristics sufficient to deem it a heavy industry, also prohibited under the Act. Finally, the on-shore storage tanks essential to the operation of the facility are prohibited structures.

This decision does not come without some appreciation of the need for additional natural gas supplies in this country nor the relative cleanliness of natural gas compared to other energy fuels. Despite the benefits that increased LNG imports might bring, placement of this facility within the boundaries of Delaware is, in my opinion, clearly a prohibited use within Delaware's coastal zone.

There is a fourteen-day appeal period following the publication of the enclosed legal notice announcement of this decision. If you wish to appeal this decision to the State Coastal Zone Industrial Control Board, please call Dennis Brown at 302-739-3091 for an appeal form. There is a one-hundred dollar appeal fee. If no appeal is received within the appeal period, this decision becomes final.

Sincerely,

s/ John A. Hughes
John A. Hughes
Secretary

pc: Dennis Brown
David S. Swayze
Michael W. Teichman

Enclosure

APPENDIX 29 — DECLARATION OF LAUREN B. SEGAL, EXHIBIT 3, DATED MARCH 31, 2005

STATE OF DELAWARE
DEPARTMENT OF NATURAL RESOURCES &
ENVIRONMENTAL CONTROL
DIVISION OF WATER RESOURCES
89 KINGS HIGHWAY
DOVER, DELAWARE 19901

OFFICE OF THE
SECRETARY

PHONE: (302) 739-4403
FAX: (302) 739-6242

March 31, 2005

Magalie R. Salas, Secretary
Federal Energy Regulatory Commission
888 First St., N.E., Room 1A
Washington, DC 20426

RE: Docket Nos. CP04-411-000

Dear Ms. Salas:

This evening's meeting is expressly designed to gather public input on the draft EIS for the proposed Crown Landing LNG facility located in both Logan Township, New Jersey and the subaqueous lands within the State of Delaware. This letter and more detailed comments on the draft EIS will be submitted to FERC in advance of the April 18th submission deadline.

For this evening however, I want to emphasize a very important position on this project taken by the State of

Appendix 29

Delaware. The Commission is already aware that this project has sought, and failed to receive, a favorable status decision from the Department of Natural Resources and Environmental Control with regard to Delaware's Coastal Zone Act. On February 3, 2005, Delaware ruled that this proposed facility was indeed a prohibited bulk product transfer facility and is strictly prohibited within our Coastal Zone. Yesterday, Delaware's Coastal Zone Industrial Control Board in a lengthy and detailed hearing upheld that decision by unanimous vote.

The Draft EIS fails to adequately address the relevance of the Delaware Coastal Zone Act to continuation of the project. The Act was passed over 30 years ago to control the development of new heavy industries and bulk product transfer facilities within our coastal zone – a zone which extends to the mean low water line on the New Jersey side of the River in the vicinity of this project. We believe very strongly that our state Coastal Zone Act applies in this instance and that no mitigating measure or response actions exist that FERC or BP can take to reverse or alter our position with respect to the facility as planned on this site.

This project is clearly a prohibited activity under Delaware law and we would request that FERC and BP act accordingly. Thank you for you attention to this matter.

Sincerely,
/s/
John A. Hughes
Secretary

pc: Gas Branch 1, PJ-11.1

APPENDIX 30 — DECLARATION OF LAUREN B. SEGAL, EXHIBIT 4, DATED APRIL 18, 2005

State of New Jersey
Board of Public Utilities
Two Gateway Center
Newark, New Jersey 07102

Jeanne M. Fox, Esq.
President

Kristi Izzo
Board Secretary
Tel: (973) 648-3426
Fax: (973) 648-2409

April 18, 2005

Magalie R. Salas, Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

Re: Crown Landing LLC — Docket No. CP04-411-000

Texas Eastern Transmission, LP — Docket No. CP04-416-000

Dear Secretary Salas:

As the agency overseeing the State's energy policy, the New Jersey Board of Public Utilities wishes to express its support of the applications filed in the above-referenced matters. The proposed Liquefied Natural Gas ("LNG") storage facility should, if all safety and environmental concerns are adequately addressed, play an important part in ensuring a competitive and reliable supply of natural gas to

New Jersey's and the region's energy customers. It also should increase the diversity of supplies available to customers in this State and region.

The Board possesses general regulatory authority over the State's utilities. Its statutory charge includes ensuring the provision of safe, adequate and proper service at just and reasonable rates. The Board is responsible for protecting the public interest in a competitive and reliable supply of energy. As more residents have switched to natural gas for heating and more natural gas is used to produce electricity, New Jersey has experienced an increased demand for this resource. Southern New Jersey, where the proposed facility would be located, has had considerable population growth. Additionally, this State has seen a steep increase in the price of natural gas, and it is our hope and expectation that this proposed LNG facility will help stabilize the cost of energy.

From an energy supply perspective, the facility proposed for Logan Township, New Jersey should further the public interest and promote the policy goal of having reliable service for New Jersey's energy customers. The Board urges the Commission to approve this application, provided all environmental and safety concerns are adequately addressed.

BOARD OF PUBLIC UTILITIES
BY:

/s/ JEANNE M. FOX PRESIDENT

/s/ FREDERICK F. BUTLER COMMISSIONER

/s/ CONNIE O. HUGHES COMMISSIONER

/s/ JACK ALTER COMMISSIONER

KI/ac

APPENDIX 31 — DECLARATION OF LAUREN B. SEGAL, EXHIBIT 5, DATED MAY 24, 2005

State of New Jersey

Department of Environmental Protection

Richard J. Codey
Acting Governor

Bradley M. Campbell
Commissioner

May 24, 2005

Mr. David Blaha
Environmental Resources Management
200 Harry S. Truman Parkway
Suite 400
Annapolis, Maryland 21401

Re: Deficiency Letter for Waterfront Development Application
File No. 0809-02-011.1
Applicant: Crown Landing LLC
Project: Crown Landing LNG Import Terminal
Block 101, Lot 2
Location: Logan Township, Gloucester County

Dear Mr. Blaha:

On February 4, 2005, the Office of Dredging and Sediment Technology ("ODST") sent you a deficiency letter regarding this project. This letter will correct an observation made in that letter regarding the project site and New Jersey's jurisdiction, review, and regulatory authority over the project, specifically the observation that activities taking place below

the mean low water line are subject to Delaware coastal zone regulations rather than to New Jersey's regulatory authority.

As stated in the ODST letter of February 4, 2005, the project consists of construction and operation of a liquefied natural gas terminal in Logan Township, Goucester County, New Jersey. The project is proposed to include construction of a berthing pier in the Delaware River and associated dredging.

The proposed liquefied natural gas plant would be located entirely within the State of New Jersey, while the proposed pier needed to service the plant would be attached to the New Jersey shoreline and extend into the Delaware River within the 12 Mile Circle. Thus, the pier would originate in New Jersey and extend into Delaware.

As State officials have made clear, and as recognized in a May 13, 2005 letter from Gregory S. Roden, Esq., Senior Attorney for BP America, Inc. to David Risilia of ODST, although a portion of the pier is proposed to be in Delaware, construction of the entire pier, and any associated dredging, is subject to New Jersey's exclusive review and permitting authority, and not that of Delaware. This is the case because the Compact of 1905 between New Jersey and Delaware, which was approved by the Legislatures of both States and by the United States Congress, gives New Jersey exclusive riparian jurisdiction of every kind and nature on its side of the Delaware River. Thus, you should disregard any indication in the February 4, 2005 letter that may suggest anything to the contrary.

Very truly yours,
/s/
Joseph J. Seebode
Assistant Commissioner

Appendix 31

c: Laurie Beppler, BP Crown Landing
William Jenkins, ACOE Philadelphia
District Regulatory Branch
Anita Ripotella, National Marine Fisheries Service
Steve Mars, US Fish and Wildlife
Robert Kopka, FERC
Lingard Knutson, USEPA Region II
Daniel Ryan, Special Assistant to the Commissioner
Don Wilkenson, NJDEP Fish and Wildlife
Dave Risilia, NJDEP ODST

APPENDIX 32 — STATE OF NEW JERSEY ASSEMBLY RESOLUTION NO. 260, ADOPTED MAY 2, 2005

ASSEMBLY COMMITTEE SUBSTITUTE FOR

ASSEMBLY RESOLUTION No. 260

STATE OF NEW JERSEY

211th LEGISLATURE

ADOPTED MAY 2, 2005

Sponsored by:
Assemblyman JOHN J. BURZICHELLI
District 3 (Salem, Cumberland and Gloucester)
Assemblyman DOUGLAS H. FISHER
District 3 (Salem, Cumberland and Gloucester)
Assemblyman JEFF VAN DREW
District 1 (Cape May, Atlantic and Cumberland)

Co-Sponsored by:
Assemblyman Mayer, Assemblywoman Quigley, Assemblymen Stack, Prieto, Hackett, Payne, Johnson, McKeon and Scalera

SYNOPSIS

Urges State of Delaware to amend the Delaware Coastal Zone Act to conform it to the Compact of 1905.

CURRENT VERSION OF TEXT

Substitute as adopted by the Assembly Commerce and Economic Development Committee.

Appendix 32

AN ASSEMBLY RESOLUTION requesting the Governor of the State of Delaware and the Delaware General Assembly to amend the Delaware Coastal Zone Act to conform it to the Compact of 1905 between New Jersey and Delaware, approved by Congress, 34 Stat. 858 (1907), to make clear that the Coastal Zone Act does not apply to facilities over which New Jersey retains riparian jurisdiction pursuant to Article VII of the Compact, R.S.52:28-41.

WHEREAS, Along the section of the Delaware River that falls within a 12 mile radius of New Castle, Delaware, the eastern boundary of the State of Delaware is the mean low-tide line on the New Jersey side of the Delaware River, a boundary originating in the original royal grants to William Penn of land which would later become the States of Delaware and Pennsylvania; and

WHEREAS, The State of Delaware exercises its authority over its land bordering and extending into the Delaware River pursuant to the Delaware Coastal Zone Act, 7 Del.C. s.7001 et seq., which subjects to state regulation industrial facilities and bulk product transfer facilities proposed for construction in the Delaware coastal zone; and

WHEREAS, New Jersey and Delaware entered into the Compact of 1905 to determine the jurisdiction of each State over the Twelve Mile Circle portion of the Delaware River, codified at R.S.52:28-34 through R.S.52:28-46; ratified by the Laws of Delaware 1905, p.121; and approved by Congress on January 24, 1907, 34 Stat. 858

(1907), and this Compact was interpreted by the United States Supreme Court in New Jersey v. Delaware, 291 U.S. 361 (1935); and

WHEREAS, Under the Compact of 1905 each State retained its riparian rights; Article VII provides in full: "Each state may, on its own side of the river, continue to exercise riparian jurisdiction of every kind and nature, and to make grants, leases and conveyances of riparian lands and rights under the laws of the respective states." R.S.52:28-41; and

WHEREAS, On February 5, 2005, the Delaware Department of Natural Resources and Environmental Control declared that the siting of a liquefied natural gas import facility and regasification plant in Logan Township, Gloucester County, New Jersey was prohibited under the Delaware Coastal Zone Act; and

WHEREAS, Each State's rights under the Compact of 1905 are a matter of settled law; the State of Delaware's implementation of its Coastal Zone Act in its present form infringes on the State of New Jersey's regulation of facilities within its jurisdiction under the Compact and serves only to undermine the amicable relations that usually prevail between the two States; and

WHEREAS, Because of the long standing regional cooperation shared by New Jersey and its bordering states, it is in the best interests of the State of Delaware, the State of New Jersey, and all states in the region, for the State of Delaware to amend its Coastal Zone Act to conform it

to the Compact of 1905 between New Jersey and Delaware, to make clear that it does not apply to facilities over which New Jersey retains riparian jurisdiction pursuant to Article VII of the Compact, R.S.52:28-41; now, therefore,

BE IT RESOLVED *by the General Assembly of the State of New Jersey:*

1. This House urges the Governor of the State of Delaware and the Delaware General Assembly to amend the Delaware Coastal Zone Act to conform it to the Compact of 1905 between New Jersey and Delaware, R.S.52:28-34 through R.S.52:28-46; ratified by the Laws of Delaware 1905, p.121; approved by Congress, 34 Stat. 858 (1907), to make clear that the Delaware Coastal Zone Act does not apply to facilities over which New Jersey retains riparian jurisdiction pursuant to Article VII of the Compact, R.S.52:28-41.

2. Duly authenticated copies of this resolution, signed by the Speaker of the General Assembly and attested by the Clerk of the General Assembly, shall be transmitted to the Governor of the State of Delaware, the Lieutenant Governor of the State of Delaware, the Speaker of the Delaware House of Representatives, the President ProTempore of the Delaware State Senate, and the Secretary of the Delaware Department of Natural Resources and Environment Control.

APPENDIX 33 — STATE OF NEW JERSEY SENATE RESOLUTION NO. 100, INTRODUCED MAY 19, 2005

SENATE RESOLUTION No. 100

STATE OF NEW JERSEY

211th LEGISLATURE

INTRODUCED MAY 19, 2005

Sponsored by:
Senator STEPHEN M. SWEENEY
District 3 (Salem, Cumberland and Gloucester)

SYNOPSIS

Urges State of Delaware to amend the Delaware Coastal Zone Act to conform it to the Compact of 1905.

CURRENT VERSION OF TEXT

As introduced.

A SENATE RESOLUTION requesting the Governor of the State of Delaware and the Delaware General Assembly to amend the Delaware Coastal Zone Act to conform it to the Compact of 1905 between New Jersey and Delaware, approved by Congress, 34 Stat. 858 (1907), to make clear that the Coastal Zone Act does not apply to facilities over which New Jersey retains riparian jurisdiction pursuant to Article VII of the Compact, R.S.52:28-41.

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WHEREAS, Along the section of the Delaware River that falls within a 12 mile radius of New Castle, Delaware, the eastern boundary of the State of Delaware is the mean low-tide line on the New Jersey side of the Delaware River, a boundary originating in the original royal grants to William Penn of land which would later become the States of Delaware and Pennsylvania; and

WHEREAS, The State of Delaware exercises its authority over its land bordering and extending into the Delaware River pursuant to the Delaware Coastal Zone Act, 7 Del.C. s.7001 et seq., which subjects to state regulation industrial facilities and bulk product transfer facilities proposed for construction in the Delaware coastal zone; and

WHEREAS, New Jersey and Delaware entered into the Compact of 1905 to determine the jurisdiction of each State over the Twelve Mile Circle portion of the Delaware River, codified at R.S.52:28-34 through R.S.52:28-46; ratified by the Laws of Delaware 1905, p.121; and approved by Congress on January 24, 1907, 34 Stat. 858 (1907), and this Compact was interpreted by the United States Supreme Court in New Jersey v. Delaware, 291 U.S. 361 (1935); and

WHEREAS, Under the Compact of 1905 each State retained its riparian rights; Article VII provides in full: "Each state may, on its own side of the river, continue to exercise riparian jurisdiction of every kind and nature, and to make grants, leases and conveyances of riparian lands and rights under the laws of the respective states." R.S.52:28-41; and

Appendix 33

WHEREAS, On February 5, 2005, the Delaware Department of Natural Resources and Environmental Control declared that the siting of a liquefied natural gas import facility and regasification plant in Logan Township, Gloucester County, New Jersey was prohibited under the Delaware Coastal Zone Act; and

WHEREAS, Each State's rights under the Compact of 1905 are a matter of settled law; the State of Delaware's implementation of its Coastal Zone Act in its present form infringes on the State of New Jersey's regulation of facilities within its jurisdiction under the Compact and serves only to undermine the amicable relations that usually prevail between the two States; and

WHEREAS, Because of the long standing regional cooperation shared by New Jersey and its bordering states, it is in the best interests of the State of Delaware, the State of New Jersey, and all states in the region, for the State of Delaware to amend its Coastal Zone Act to conform it to the Compact of 1905 between New Jersey and Delaware, to make clear that it does not apply to facilities over which New Jersey retains riparian jurisdiction pursuant to Article VII of the Compact, R.S.52:28-41; now, therefore,

BE IT RESOLVED *by the Senate of the State of New Jersey:*

1. This House urges the Governor of the State of Delaware and the Delaware General Assembly to amend the Delaware Coastal Zone Act to conform it to the Compact of 1905 between New Jersey and Delaware, R.S.52:28-34

through R.S.52:28-46; ratified by the Laws of Delaware 1905, p.121; approved by Congress, 34 Stat. 858 (1907), to make clear that the Delaware Coastal Zone Act does not apply to facilities over which New Jersey retains riparian jurisdiction pursuant to Article VII of the Compact, R.S.52:28-41.

2. Duly authenticated copies of this resolution, signed by the President of the Senate and attested by the Secretary thereof, shall be transmitted to the Governor of the State of Delaware, the Lieutenant Governor of the State of Delaware, the Speaker of the Delaware House of Representatives, the President Pro-Tempore of the Delaware State Senate, and the Secretary of the Delaware Department of Natural Resources and Environment Control.

STATEMENT

This Senate Resolution urges the Governor of the State of Delaware and the Delaware General Assembly to amend the Delaware Coastal Zone Act to conform it to the Compact of 1905 between New Jersey and Delaware, R.S.52:28-34 through R.S.52:28-46; ratified by the Laws of Delaware 1905, p.121; approved by Congress, 34 Stat. 858 (1907), to make clear that it does not apply to facilities over which New Jersey retains riparian jurisdiction pursuant to Article VII of the Compact, R.S.52:28-41.

Along the section of the Delaware River that falls within a 12 mile radius of New Castle, Delaware, the eastern boundary of the State of Delaware is the mean low-tide line on the New Jersey side of the Delaware River, a boundary originating in the original royal grants to William Penn of

land which would later become the States of Delaware and Pennsylvania. The State of Delaware exercises its authority over its land bordering and extending into the Delaware River pursuant to the Delaware Coastal Zone Act, 7 Del.C. s.7001 et seq., which subjects to state regulation industrial facilities and bulk product transfer facilities proposed for construction in the Delaware coastal zone.

New Jersey and Delaware entered into the Compact of 1905 to determine the jurisdiction of each State over the Twelve Mile Circle portion of the Delaware River, codified at R.S.52:28-34 through R.S.52:28-46; ratified by the Laws of Delaware 1905, p.121; and approved by Congress on January 24, 1907, 34 Stat. 858 (1907). This Compact was interpreted by the United States Supreme Court in New Jersey v. Delaware, 291 U.S. 361 (1935). Under Article VII of the Compact of 1905 each State retained its riparian rights. Article VII provides in full: "Each state may, on its own side of the River, continue to exercise riparian jurisdiction of every kind and nature, and to make grants, leases and conveyances of riparian lands and rights under the laws of the respective states." R.S.52:28-41.

On February 5, 2005, the Delaware Department of Natural Resources and Environmental Control declared that the siting of a liquefied natural gas import facility and regasification plant in Logan Township, Gloucester County, New Jersey was prohibited under the Delaware Coastal Zone Act.

Appendix 33

This resolution urges the State of Delaware to amend its Coastal Zone Act to conform it to the Compact of 1905 to make it clear that it does not apply to facilities over which New Jersey retains riparian jurisdiction pursuant to the Compact.

APPENDIX 34 — BRIEF FOR PLAINTIFF ON EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER, *NEW JERSEY v. DELAWARE*, DATED DECEMBER 18, 1933 (EXCERPT, COMPACT OF 1905)

NEW JERSEY-DELAWARE BOUNDARY CASE.

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1933.
No. 13, Original.

STATE OF NEW JERSEY,

Plaintiff.

vs.

STATE OF DELAWARE,

Defendant.

On Exceptions to the Report of the Special Master.

BRIEF FOR PLAINTIFF.

WILLIAM A. STEVENS
Attorney General,
Solicitor for Plaintiff.

GEORGE S. HOBART,
DUANE E. MINARD,
Counsel.

December 18, 1933.

Appendix 34

[table of contents intentionally omitted]

* * *

II. (7) Compact of 1905.

(7) Compact of 1905.

(Exceptions 91-3.)

In the months of April and May, 1872, officers of defendant arrested 20 or more citizens of plaintiff while fishing in Delaware river, east of the middle of the river, within a radius of 12 miles of New Castle, on the claim that that part of the river belonged to defendant and that the fishermen were violating a law of defendant, passed the previous year *(Ex. 693, p. 22)*. That was the first, and only, time that defendant has ever attempted to enforce its laws, or assert any authority or jurisdiction, therein. A controversy arose between the two states, described in the proclamations and correspondence of their respective governors recited in Exhibit 693, pp. 23-38. Plaintiff's legislature authorized the appointment of a commission to settle the dispute, but defendant declined to join in that project *(ibid)*. Plaintiff, by leave of the court, filed its bill of complaint March 13, 1877, praying for the ascertainment of the true boundary between the two states and of the rights and estate of petitioner in the bed of the river in that area, and of the rights of its citizens and inhabitants to fish therein, and that defendant be enjoined from interference therewith *(Ex. 693, pp. 40-41)*.

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A motion for preliminary injunction, argued March 18, 1877, resulted in an order of March 26, 1877 (*State of New Jersey v. State of Delaware, No. 17, Original, October Term, 1876*), reading as follows:

> "This cause coming on to be heard on a motion for a preliminary injunction made on behalf of the complainant, and being argued by Mr. Frelinghuysen and Mr. Vanatta for the complainant, and by Mr. Bayard for the defendant, and it appearing by the allegations of the bill, duly verified by affidavits and other evidence of public character, that for a long period of time, to wit, more than seventy years last past, the State of New Jersey has claimed and exercised jurisdiction over the easterly portion of the river Delaware to the middle of the same, where the said river runs between the said State and the State of Delaware, and that (except as hereinafter stated) the citizens and inhabitants of New Jersey have, during said period, exercised the right of freely fishing in said river, in common with the citizens and inhabitants of said State of Delaware, but that recently, to wit, from and since the year 1872, the State of Delaware has claimed exclusive jurisdiction of the whole of said river from the southerly line of Pennsylvania southwardly to the distance of twelve miles below the town of New Castle, and has interfered with and claimed to control the right of fishing thereon, and has exacted fines and other impositions from the said citizens and inhabitants of New Jersey for fishing as aforesaid, unless they

would take out licenses for that purpose from the authorities of the State of Delaware, and pay certain fees and exactions for said licenses, and has caused to be arrested certain of said citizens and inhabitants for refusing to comply with such requirements; and that the State of Delaware still threatens and intends to enforce its said claims, which are resisted by the State of New Jersey; and that the public peace between the citizens and inhabitants of said States is liable to be endangered and interrupted by reason of the premises; and this suit being brought for the purpose of determining the true boundary line between the said States, and settling the controversies between them in reference to the matters aforesaid; therefore—

It is ordered by the court that an injunction do issue to enjoin and restrain the said State of Delaware, its officers, agents and servants, that they and each and every of them do henceforth desist and refrain from imposing any tax, assessment or imposition whatsoever, by way of license fee or otherwise, upon any citizen or resident of the State of New Jersey, and from requiring them, or any of them, to take a license from or under the State of Delaware for right or authority to fish in the river Delaware, as they have heretofore been accustomed to do, before the said interference; and from arresting, imprisoning, trying, fining, or in any manner punishing, or seizing, holding or selling any property of any citizen or resident of New Jersey for fishing in

said river as aforesaid, until this court shall make other order to the contrary" (*Ex. 237, pp. 13-15*).

Defendant filed its answer, claiming title and jurisdiction in the bed of the river to low water mark on the east side within a radius of 12 miles of New Castle. A compact having been agreed upon between the parties (*Ex. 237, pp. 18-26*), the case was, on April 15, 1907, discontinued without prejudice (*205 U.S. 550*).

That case involved only the right of common fishery by citizens of plaintiff in Delaware river within a radius of 12 miles of New Castle. The pleadings did not include any question of territorial jurisdiction or boundary outside that area (*Ex. 693*). No question was raised in that case by defendant respecting grants theretofore made by plaintiff of lands under water below low water line in the area in dispute, or respecting the right, title and interest of the grantees, or respecting appropriations to their exclusive use, by citizens of New Jersey of lands below low water line in that area. Such titles and interests have never been questioned by defendant, and have been enjoyed and exercised, continuously, by plaintiff from the first legislative grant of such lands in 1854 down to the present time, and such appropriations have been made and enjoyed since before 1801, according to the present record.

The Compact was ratified by plaintiff's legislature March 21, 1905 (*Ex. 161, pp. 35-6*); by defendant's legislators on March 20, 1905 (*Ex. 161, pp. 14-15*) and approved by Congress January 24, 1905 (*Ex. 53; 34 St. L. Pt. I, Ch. 394, p. 858*).

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The Compact recites the controversy between the parties:

> "relative to jurisdiction of such portion of the Delaware river as is included within the circle of 12 miles radius, an arc of which constitutes the northern boundary of the State of Delaware, and it is the mutual desire of said States to so settle and determine such controversy as to prevent future complications arising therefrom."

It recites the pendency of the suit in this court and the injunction granted therein in 1877 (*Ex. 53, p. 1*).

Articles I and II provide for concurrent jurisdiction in civil and criminal processes on the entire river.

Article III provides for concurrent rights of common fishery by the inhabitants of both states on any part of the river between low water marks, "except so far as either state may have heretofore granted valid and subsisting private rights of fishery." The Compact further provides as follows:

> "Article VII. Each State may, on its own side of the river, continue to exercise riparian jurisdiction of every kind and nature, and to make grants, leases and conveyances of riparian lands and rights under the laws of the respective States.
>
> Article VIII. Nothing herein contained shall affect the territorial limits, rights or jurisdiction of either State of, in or over the Delaware river,

> or the ownership of the subaqueous soil thereof, except as herein expressly set forth" (*Ex. 53, p. 5*).

The Master, after quoting said sections, said

> "Under this Compact clearly all improvements made by riparian owners upon the shore of either State are protected, and any decree fixing the boundary between the plaintiff and the defendant must so provide" (Rep. p. 54).

He found that this Compact recognized a right of riparian owners to wharf out on the easterly side of the Delaware river within the 12 mile circle but that it did not convey to plaintiff title to any part of the river or to any part of the subaqueous soil thereof, and did not in anywise alter or affect the boundaries of the respective states *(Rep. p. 77, Finding No. 23)*. He recommended a decree as follows: "That within the 12 mile circle the river and the subaqueous soil thereof shall be adjudged to belong to the State of Delaware; subject to the Compact of 1905" *(Rep. p. 80, Recommendation No. 1)*. That finding and that recommendation appear to be inconsistent and indefinite.

At the time the Compact was made owners of the shore front, referred to by the Master as "riparian owners" had no right to wharf out, and had no rights below high water mark. Under the heading "*Riparian Rights and Grants*" of this brief, it appears that such rights were recognized prior to an Act of 1851 *(N. J. P. L. 1851, p.* 335). From that time until the enactment of Chapter 383, in 1869, *(N. J. P. L. 1869,*

p. 1007) they still had the right to wharf out to low water line without public permission, but the Act of 1851 was then repealed and thereafter private use of the land below high water mark could not be acquired except by a grant from plaintiff, at other places in New Jersey, and that law was applied to the Delaware river and bay in 1871 (*N. J. P. L. 1871, p. 44*).

Numerous grants were made by plaintiff in the bed of the river below low water mark, between 1854 and the date of the Compact (*Exs. 3, 41, 42, 43, 44, 48, 70, 92; R. 125; 280, 282, 291; 382-4, 522-40*).

After the Compact was made, plaintiff, without objection by defendant, continued to make grants of the bed of the Delaware river below low water mark in that area; 25 of these are shown in this record (Exs. 58-69; 73-91; 93-7; 2; 3; 57; 127; R. 120; 291; 84-90; 117-123; 130-155; 265-292).

Most of these grants extend to the bulkhead lines established by plaintiff in 1877 (*Ex. 144*) or to a later one in 1916, both of which were *below* low water mark at distances varying from 378 to 3,550 feet (*Ex. 144, R. 339; Ex. 145; R. 275, 290-1, 340-1*).

The Compact constituted the settlement of a litigation in which the boundary, including territory and jurisdiction within a radius of 12 miles of New Castle, was directly in controversy. Defendant claimed to low water mark on the east side. Plaintiff claimed to the middle of the ship channel, and it had granted lands, and citizens of both states had purchased such titles from plaintiff and possessed and

improved them at great expense, in the bed of the river below low water mark. This, although not involved in the lawsuit any more than the oysters and clams mentioned in Article VI of the Compact, was considered by the commissioners, and they agreed that plaintiff " on its own side of the river," should "*continue* to exercise riparian jurisdiction of *every kind and nature*, and to *make grants, leases and conveyances* of riparian lands and rights" under its own laws. If that language referred to lands between high and low water mark, *only*, it was meaningless, since defendant never claimed such lands. Plaintiff had, for 60 years, prior to the date of the Compact, made a practice of conveying the bed of the river to navigable water at low tide (*Exs. 41, 42, 43, 44, 48*). Docks and other permanent fixed improvements, accessible to vessels at low tide, were built on these tracts, and are still in use.

On that state of facts, the above quoted language of the Compact was adopted. It meant lands *below* low water mark, or it meant nothing, since there were no grants by plaintiff of land *between* high and low water marks.

When the Master says that Compact conveyed no title to any part of the subaqueous soil of the river or in anywise altered or affected the boundary (assuming, as he does, that the boundary is at low water mark) *(Rep. p. 77, Finding No. 23)*, he overlooks the very important exception in Article VIII of the Compact, reading:

> "Nothing herein contained shall affect the *territorial limits*, rights or jurisdiction of either State of, *in* or over *the Delaware river, or the ownership of the subaqueous soil thereof*, **except**

as herein expressly set forth" (*Ex. 53, p. 5*). (Italics ours.)

That exception, taken with Article VII, can have but one meaning respecting "territorial limits" "*in*" "the Delaware river, or the *ownership of the subaqueous soil* thereof," namely, to concede to plaintiff its claim of title and jurisdiction, and the right to convey that title and exercise that jurisdiction, in the subaqueous soil in the river *below* low water mark east of the main ship channel.

It has been so interpreted by both parties ever since, and that interpretation has not been questioned in this suit.

Not only has plaintiff continued to grant this land (to the extent of above 10,000 lineal feet) ever since that Compact was made, but such grants have been accepted during that time by citizens of defendant to the extent of more than 5,000 lineal feet, for considerations aggregating more than $87,000.

Plaintiff has acted upon that interpretation, without a single objection from defendant, for the past 28 years. It established its new pierhead line in that area in 1916 (*Ex. 145*), and all the grants made since that time by plaintiff have extended to that line, including those made to and accepted by citizens of defendant; in several instances to a Delaware corporation, in which the Attorney General of defendant was one of the incorporators at the time the grant was obtained, and these grants have been improved by the purchasers to the extent of several millions of dollars.

Defendant has never yet objected to, or raised any question about, these grants.

Plaintiff submits that these facts show a practical construction by both parties of this Compact which has been acted upon by plaintiff, and acquiesced in by defendant, during the past 28 years, and that the Master is in error if the language he uses (*Finding No.* 23, *Rep. p.* 77) means that defendant did not concede to plaintiff by that Compact any title to any part of the subaqueous soil of the river below low water line on the east side thereof, and did not in anywise alter or affect the boundary, as then claimed by defendant on that low water line. Plaintiff contends that that Compact did concede to plaintiff title to the subaqueous soil of the river, within a radius of 12 miles of New Castle, to the extent necessary to accommodate navigation and commerce to the industries which have developed, and used, or may develop and use, the subaqueous soil on that side.

The Master therefore errs in finding and concluding that defendant has title to low water mark on the east side of the river, within a radius of 12 miles about New Castle, and that this Compact did not in anywise alter or affect that boundary.

* * * *

APPENDIX 35 — REPLY BRIEF OF DEFENDANT BEFORE SPECIAL MASTER, *NEW JERSEY v. DELAWARE*, OCTOBER TERM, 1929 (EXCERPT, POINT I)

IN THE

SUPREME COURT OF THE UNITED STATES

No. 19 Original. **October Term, 1929.**

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF DELAWARE,

Defendant.

REPLY BRIEF OF DEFENDANT BEFORE SPECIAL MASTER.

REUBEN SATTERTHWAITE, JR.
Attorney General of the State of Delaware
CLARENCE A. SOUTHERLAND,
Special Counsel.

WARD & GRAY,
Of Counsel.

Appendix 35

[table of contents intentionally omitted]

This reply brief will be devoted to answering certain of the arguments advanced in Plaintiff's first brief, and will follow the subject headings in Plaintiff's brief.

I. Points 4 to 21, Inclusive. Brief, pp. 20-146.

Under the heading of points four to twenty-one of the first division of the argument, Plaintiff's brief discusses common law rights in tidal waters and certain modifications of the common law that arose in the American colonies. It is urged that these changes in the common law were binding upon William Penn and operated to defeat his title to the bed of the Delaware River east of the main ship channel within the twelve-mile circle.

To the statement of the common law of England respecting tidal waters we take no exception. In answer to the statement that the common law prevails in Delaware (Brief, p. 25), we would point out that the common law of the State of Delaware differs from the common law of England with regard to the foreshore in that in Delaware the owner of lands fronting on navigable rivers holds to low-water mark instead of to high-water mark.

Harlan & Hollingsworth v. *Paschal*, 5 Del. Ch. 435;

State v. *Reybold*, 5 Harr. 484, 486.

This modification of the English law is undoubtedly due to custom and usage.

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On pages 36 to 72 of the brief, the argument is developed that from earliest colonial times the inhabitants of New Jersey were accustomed to exercise certain riparian privileges not recognized by the strict doctrine of the common law, including particularly the right to wharf out to at least low-water mark.

Plaintiff also refers to the rights of navigation and of fishery which existed in the inhabitants of the province of New Jersey, but these rights, as we shall hereafter show, were common to all British subjects and are in no wise based upon colonial custom. The right of *several* fishery that exists in New Jersey is undoubtedly the growth of a colonial custom.

Plaintiff argues that the right of the citizens of New Jersey to wharf out is in some way inconsistent with or adverse to the ownership of the subaqueous soil of the Delaware River by William Penn. This contention is without merit. In the first place the New Jersey cases relied on by Plaintiff seem to limit this right to low-water mark.

See *Bell* v. *Gough*, 23 N. J. Law 624, 668, where the Court of Errors and Appeals said:

> "The facts and considerations above stated, it seems to me, establish not only a usage originating with the first settlement of this state, coextensive with its limits, and until recently unquestioned, for the owners of land adjoining to its navigable waters to appropriate to their exclusive use the shores of such waters to the low water line, but that this usage has been sanctioned

> by the courts and by repeated legislative enactments too unequivocal to admit of dispute and too plain to be disregarded."

Whether or not the grant to the Duke of York and the grant of the Duke of York to Berkeley and Carteret carried title to the foreshore of the Delaware River and Bay, it is a fact that the State of Delaware has never claimed any title above low water mark on the New Jersey shore, so that the existence of an ancient right to wharf out to low water mark in the inhabitants of the Province of New Jersey is in no way inconsistent with the Penn title.

In the second place, however, viewing the matter in a much broader light, the law in most of the States of the Union recognizes the right of a riparian owner, in the absence of legislative restriction, to wharf out for the purpose of obtaining access to the navigable portion of the river. See the discussion in Volume 1, Farnham on "Waters and Water Rights," sections 62-66; and the review of the State decisions by Mr. Justice Gray in *Shively* v. *Bowlby*, 152 U.S. 1.

The courts of the State of New Jersey, however, not recognizing the *title* of the riparian proprietor below high water mark, have of necessity somewhat limited these rights. In the State of New Jersey the riparian owner has no title below high water mark. This was the common law of England. The right of the riparian owner in New Jersey to wharf out is not based on any theory of title to the foreshore or to the subaqueous soil of the river. It is a right which is in the nature of a burden upon the ownership of the foreshore

and subaqueous soil. It is a right which is recognized at least as fully, if not more fully, by the laws of the State of Delaware. The holder of such a right does not hold it adversely to the State as the owner of the subaqueous soil but in effect derives it from the State.

It follows, therefore, that the existence of this right and its use by the erection of a wharf is not an act which is hostile to the State as owner and can not be made the foundation for a claim of adverse possession.

The New Jersey doctrine of riparian rights is stated by Justice Potts in *Bell* v. *Gough, supra,* as follows (p. 681):

> "The result is, that though the legal title of the Messrs. Coles, under whom the defendant in error holds, extends only to the line of ordinary high water mark, yet they possess rights, as riparian owners in the adjacent shore and waters, of which they cannot be divested without their consent, or compensation; that the land between high and low water mark belongs to the state for the use and benefit of the public, but that this title cannot be granted to a private person for a private use; that the act of 1836 is inoperative and void, and that, consequently, as no title passed from the state to those under whom the plaintiff in error claims, she has failed to maintain her plea, and the judgment below must be affirmed."

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In *State* v. *Jersey City*, 25 N. J. Law 525, Judge Elmer of the New Jersey Supreme Court said:

> "It must now be accepted as the established law in New Jersey, that the right of the owner of lands bounding on a navigable river extends only to the actual high water mark, and that all below that mark belongs to the state. The inchoate right, if such it may be called, which the proprietor of the upland has, either with or without a license, to acquire an exclusive right to the property, by wharfing out or otherwise improving the same, gives him no property in the land while it remains under the water. It may be granted by the state to a stranger, at any time before it is actually reclaimed and annexed to the upland. Such is unquestionably the common law, and I am aware of no alteration of it in this respect in New Jersey. Some of the judges seem to have expressed a different opinion in the case of *Bell* v. *Gough*, before the Court of Errors, but no case has been decided which establishes a different doctrine. In that matter, I concur myself with the opinion expressed by Judge Randolph. 2 *Zab.* 491. If the blocks and lots covered with water had been in this case valued and assessed entirely distinct from the upland, I should have felt constrained to hold that the assessment could not be supported."

The result of these decisions in New Jersey would seem to make it clear that before the New Jersey legislature undertook by various riparian acts to protect the riparian

rights of the owners of the upland the common law doctrine prevailed and was modified only in so far as the riparian owner actually reclaimed the shore or exercised his riparian right by the actual erection of a wharf.

It follows from the foregoing decisions of the New Jersey courts, as well as from the general law on the subject, that the recognition of such riparian rights in colonial times never had the effect of passing *title to the soil* to the riparian owner. Much less did it have the effect of vesting title in the province of New Jersey to the bed of the river east of the main ship channel. Plaintiff does not expressly claim that the recognition of these riparian rights vested such title in the Province of New Jersey. Yet that must be the contention of Plaintiff, because otherwise the argument is beside the point.

Plaintiff's brief says (p. 70):

> "The foregoing authorities show that, independent of the common law of England respecting public rights in tidal waters, a modification of the strict common law rule came into practice and common usage among the settlements on Delaware river and bay at the beginning of colonial history, as a matter of necessity arising from their situation and conditions, which had the implied, if not the actual, approval of the Crown and its successors in sovereignty. Under such modifications of the common law rights have sprung up, in favor of plaintiff and its inhabitants in the bed of tidal waters of Delaware river and bay, east of the ship

> channel, which are binding upon defendant, whether it derives its title from Penn (who was one of the West Jersey Proprietors at the times mentioned) or from the Crown."

We agree that under colonial usage and custom in both the Province of New Jersey and the Colony of Delaware riparian rights sprang up, unknown to the English common law. What of it? Such rights are in no wise inconsistent with the fact that the ownership of the subaqueous soil was vested in William Penn, and the recognition of such rights could not avail to change the boundaries of the colonies.

We are here concerned with a question of title and boundaries. If the riparian owner's right to wharf out vested in him no title to the foreshore or the subaqueous soil of the river then the title thereto remained unaffected by the existence of the right. Moreover, that right flowed from custom and usage sanctioned by the proprietaries of both colonies. It is elementary that one who claims a right derived as grantee of another does not hold adversely to the other and can not by the exercise of that right acquire title by adverse possession.

The conclusion, therefore, is that the exercise of riparian rights by the inhabitants of the Province of New Jersey was not in any sense hostile or adverse to the ownership of the soil by William Penn. It was a right which he and all other proprietaries of American colonies accorded to the inhabitants of those colonies.

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Plaintiff is here seeking to establish *title* to the subaqueous soil of the Delaware River east of the main ship channel. Such title can not be established by pointing to the exercise of riparian rights by the inhabitants of the Province of New Jersey. Even if it could be argued that the riparian owner acquired title by adverse possession to the subaqueous soil underneath the wharf erected by him, such adverse possession would not inure to the benefit of New Jersey and would not shift the boundary line between the States.

It is to be noted that Plaintiff does not expressly claim that the exercise of riparian rights by the inhabitants of the Province of New Jersey had the effect of establishing title in the proprietors of New Jersey to the middle of the main ship channel. We do not see how such a proposition could be argued. Yet unless Plaintiff is prepared to make such an argument it is not seen how the existence of wharf rights has any bearing on the case. If the Province of New Jersey at the time of the Revolution did not hold title to the eastern half of the Delaware River and if the riparian owners on the western shore of New Jersey did not hold such title—and both these propositions seem to be admitted by Plaintiff—then the title was of necessity in William Penn by virtue of the deeds of feoffment and the letters patent of March 22, 1682/3, from the Crown.

To put the matter in another way, the right of the riparian owner to wharf out does not rest upon title to the subaqueous soil, and a claim to ownership of the subaqueous soil by the State of Delaware is not inconsistent with the use of such subaqueous soil by the riparian proprietor for the purpose of wharfing out.

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Let us suppose that after a lapse of time a riparian owner who has erected a wharf upon subaqueous soil in front of his property tears down that wharf and does not rebuild it. Surely it can not be said that he holds title to the subaqueous soil which is no longer covered by a wharf. He still has the right to build another wharf, but the ownership of the soil is not thereby changed.

Let us suppose again that a valuable mineral deposit is found in the subaqueous soil of the river within the area circumscribed by the piling of the wharf erected by the owner of the upland. Could it be contended for a moment that the owner of the upland, by virtue of his having erected a wharf, would have any title to such deposit? Clearly not. Nor could the riparian owner contend that by virtue of his long possession of the wharf he had acquired a title by prescription to the subaqueous soil.

As pointed out in our original brief, nearly all the New Jersey grants of riparian rights within the twelve-mile circle, and practically all the improvements on the New Jersey shore within the twelve-mile circle, were made or built after the institution of the prior suit in 1877. The failure of the State of Delaware to attempt to tax these improvements during the pendency of this suit can not be ascribed to laches nor can any acquiescence be imputed to the State during that time.

Riparian rights of the New Jersey side of the river were recognized by the Compact of 1905, quoted on page 126 of Plaintiff's brief. Article VII of this Compact recognizes, by implication, the rights of riparian owners on the New Jersey shore. It is to be noted that Article VII refers to "riparian

lands and rights". Subaqueous soil is not comprehended with the term "riparian lands".

Hart v. *Board of Levee Commissioners*, 54 Fed. 559;

Bathgate v. *Irvine*, 58 Pac. 442, 126 Cal. 135;

Rome Railway & Light Co. v. *Loeb*, 141 Ga. 202, 80 S. E. 785, Ann. Cas. 1915 C. 1023.

Article VII of the Compact is obviously merely a recognition of the rights of the riparian owners of New Jersey and a cession to the State of New Jersey by the State of Delaware of jurisdiction to regulate those rights. That the Compact of 1905 left the title to the subaqueous soil unaffected is clear from the express language of Article VIII.

Plaintiff's brief says (p. 126)

> "That compact, alone, is sufficient to sustain the title of plaintiff and its grantees in the bed of the river east of the ship channel, independent of all other considerations."

It may be safely said that this contention is one that did not occur to Plaintiff's counsel until after the suit was field. The Bill of Complaint in this case (Rec., pp. 4-18) sets forth with great particularity the source of Plaintiff's claim of title to the eastern half of the Delaware River and nowhere mentions the Compact of 1905 as the source of that claim. Moreover, the construction placed upon the Compact at all times since its execution and approval by Congress has been

the reverse to that now contended for by Plaintiff. Since 1907 the United States has accepted several cessions of subaqueous soil from the State of Delaware east of the ship channel within the circle. It is safe to say that the contention made in Plaintiff's brief in this case is the first time that the idea has ever been advanced that the Compact of 1905 settled the boundary dispute within the twelve-mile circle. Certainly if it had settled the dispute by ceding to New Jersey the eastern half of the river there would have been no occasion whatever for the language of Article VIII of the Covenant which expressly reserves the boundary question from the settlement.

On pages 132-146 of the brief Plaintiff discusses the exercise of admiralty jurisdiction and rights of navigation upon the assumption that these were acts of dominion by the province of New Jersey over the Delaware River. This assumption is wholly unfounded. By the English common law the right of navigation of a navigable river was a right in the subject, protected by the Crown, and every grant of the subaqueous soil of a navigable river was subject to this right. The exercise of admiralty jurisdiction was the exercise of the Royal prerogative applicable alike to colonial and proprietary colonies, and in no wise inconsistent with the ownership of the subaqueous soil by William Penn.

It is stated (Plaintiff's brief, p. 132) that defendant has produced no record of any judicial or other proceeding which shows the exercise of jurisdiction by the State of Delaware within the twelve-mile circle. This statement ignores the evidence that was presented to the arbitrator in the *Case of Pea Patch Island*, a summary of which is found in the opinion, and ignores numerous instances of the exercise of

jurisdiction testified to by the witnesses in the former suit. (Exhibits 691, 692, 694, 719.)

Plaintiff's brief (p. 140) refers to Defendant's Exhibit 569 as an exhibit introduced "to show exercise of admiralty jurisdiction in New Castle." The exhibit was introduced for the purpose of showing that the Admiralty Court which, as Plaintiff rightly says, was a Royal Court and not a Colonial Court, *judicially construed the phrase:* "territories thereof and thereon depending" as meaning the Delaware counties. Many of the acts of the Pennsylvania Colonial Assembly contained this phrase and its meaning is thus judicially determined in the case summarized in Exhibit 569.

* * * *

APPENDIX 36 — TRANSCRIPT OF ORAL ARGUMENT BEFORE SPECIAL MASTER, *NEW JERSEY v. DELAWARE*, DATED SEPTEMBER 12, 1932 (EXCERPT)

Delaware Boundary Case

Stenographer's Record

Fourteenth Session.

STATE OF NEW JERSEY

vs.

STATE OF DELAWARE.

Oral Argument Before the Special Master.

Baltimore, Maryland

September 12, 1932

DUANE E. MINARD,
for Plaintiff.

CLARENCE A. SOUTHERLAND,
for Defendant.

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[commencing at page 90]

The Master: That would be within the twelve mile circle.

Mr. Southerland: Within the twelve mile circle, and east of the ship channel. The apparent reason was that under the New Jersey Constitution a grant of that sort could not be made without compensation, and it being impracticable to pay compensation, the Government took a Delaware deed and improved the land and is still there under a Delaware title. All I am seeking to [**1214**] point out is the recognition of the claim of both these States to the eastern half within the twelve mile circle. Taking the maps all in all, they show this, the later maps in this section of the country have followed the United States Geological Survey, putting the boundary on the [91] New Jersey shore, which shows at least, an existing dispute with our friends from New Jersey.

There is one feature of that, however, which calls for comment. The argument is made that plaintiff and its citizens have acquired by prescription certain rights, and it is stated that modifications of the common law of England have sprung up. We agree with that undoubtedly. By an early common law of England, no subject could encroach upon the foreshore unless he had a grant for it. That law was wholly unsuited for the development of the American colonies, and the only State we know of that has clung to it in any way is the State of New Jersey. The law is, as laid down by Chief Justice Marshall, that you hold to low water mark, not to high water mark, but the State of New [**1215**] Jersey holds tenaciously to the theory that it owns the foreshore.

Undoubtedly modifications have sprung up. In *Gough v. Bell*, a New Jersey case, the Court seems to limit it to low water mark. We say it is undoubtedly true in the State of Delaware and in most of the American colonies that the upland owner had the right to wharf out and that right was not adverse to the owner of the soil. When you build a wharf on the State's land at New Castle, or Rehoboth, or somewhere on the Delaware shore, you are not trespassing on the property of the State of Delaware. The State of Delaware gives you that right subject only that you must not either by State or Federal law obstruct navigation.

We say moreover that the Compact of 1905 expressly acknowledged the rights of the citizens of New Jersey, at least, by implication to wharf out, and in my view the Compact of 1905 ceded to the State of New Jersey all the right to control the erection of those wharves and to say who shall erect them, and it was a very sensible thing to do. Therefore, we say there is no case here for the ap-[92]plication of any doctrine [**1216**] of prescription, that the evidence that is in simply shows that each State has continuously on every possible occasion asserted its claim to the best of its ability.

My friend complains about the nature of the evidence we have put in showing dominion over the river. Actually there is no evidence, if you please, in this record except the arrest of one or two fishermen by New Jersey of any dominion by the State or Federal Courts of New Jersey. It is impossible for us at this date to discover the issuance of writs one hundred years ago, and the writ itself would show nothing. That testimony was before Mr. Sargeant in the Pea Patch

case and a resume of the testimony is in his opinion. I appreciate that one hundred years have gone by since that decision, but the Supreme Court of the United States has recognized the fact that a long lapse of time since such testimony was available is a good reason for taking the best that can be gotten.

The Master: In connection with that provision of the Compact, there is another provision immediately [**1217**] preceding regarding fisheries. I confess to a good deal of perplexity as to the provision regarding fisheries.

APPENDIX 37 — DEFENDANT'S REQUESTS FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW, *NEW JERSEY v. DELAWARE*, OCTOBER TERM, 1929

IN THE

Supreme Court of the United States

No. 19 Original. **October Term, 1929.**

STATE OF NEW JERSEY,

Plaintiff.

v.

STATE OF DELAWARE,

Defendant.

Defendant's Requests for Findings of Fact and Conclusions of Law.

REUBEN SATTERTHWAITE, JR.,
Attorney General of the State of Delaware.

CLARENCE A. SOUTHERLAND,
Special Counsel.

Ward & Gray,
Of Counsel.

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The defendant requests the Special Master to find the following facts and conclusions of law:

FINDINGS OF FACT.

1. The territory now comprised within the State of Delaware was originally settled in the seventeenth century by the Dutch and Swedes, the first settlement having been made at Swaanendael by the Dutch near the present town of Lewes, Sussex County, Delaware, in 1631. Subsequent settlements were made by the Dutch and Swedes within said territory prior to 1664.

2. In 1664 the territory now comprised within the State of Delaware, and the settlements then existing and then under the Government of the Dutch, were conquered by the Crown of England. From 1664 until August 24, 1682 (with the exception of a brief period from July, 1673, to February 9, 1674) the said territory and said settlements were administered and governed in all respects as a dependency of the Government and Colony of New York, the proprietary of the New York Colony being during all of said period his Royal Highness James, Duke of York and Albany, the heir presumptive to the Crown of England.

3. The Duke of York, though without record title by letters patent from the Crown for the said territory or for the said powers of government over said territory, had a *de facto* title to and was the *de facto* proprietary of said territory and settlements from the date of the English Conquest in 1664 until the date of his grants to William Penn on August 24, 1682.

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4. On August 24, 1682, the Duke of York granted and conveyed to William Penn by deed of feoffment and also by lease for ten thousand years, the following lands and waters:

> "All That the Town of Newcastle otherwise called Delaware And all that Tract of Land lying within the Compasse or Circle of Twelve miles about the same scituate lying & being upon Ye River Delawarr in America And all Islands in the said River Delaware and the said River and soil thereof lying North of the Southernmost part of the said Circle of Twelve Miles about the said Town."

The said deed of feoffment contained a covenant on the part of the said Duke of York for further assurance of the title thereby conveyed at any time within seven years from the date thereof.

5. On October 28, 1682, formal livery of seisin and delivery of possession of the lands and waters above described in said deed of feoffment was duly made to William Penn by duly authorized attorneys on behalf of the Duke of York, and on the same day the inhabitants of New Castle duly submitted to the government of William Penn. On November 21, 1682, the Government of the Colony of New York, through its duly authorized officers, approved and authorized the transfer to William Penn of the said lands and waters by the Duke of York, and enjoined all magistrates and officers within the limits of the lands thus conveyed to submit to the government of William Penn and yield him obedience.

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6. On August 24, 1682, by deed of feoffment and also by lease for ten thousand years, the Duke of York conveyed to William Penn a tract of land beginning twelve miles south of New Castle, Delaware, and extending southerly to Cape Henlopen. Said deed of feoffment contained a covenant on the part of the said Duke of York for the further assurance of the title thereby conveyed at any time within seven years from the date thereof. On November 7, 1682, livery of seisin and delivery of possession of said lands last referred to was duly made to William Penn by said duly authorized attorneys on behalf of the Duke of York.

7. Immediately following the formal livery of seisin and delivery of possession to William Penn of the lands described in said two deeds of feoffment and two leases above referred to, William Penn organized and established a government for the three counties comprising the Delaware territory. On December 7, 1682, by Act of a joint assembly consisting of representatives from the Pennsylvania Counties and from the Delaware Counties, the three Delaware Counties were annexed to the Province of Pennsylvania.

8. From 1682 until 1701, the three counties of Delaware and the Province of Pennsylvania were governed by a joint legislative assembly. Thereafter, and until the American Revolution, the Colony of Delaware had its own separate legislature, but until the revolution continued to acknowledge William Penn and his successors as proprietaries and governors of Delaware.

9. From 1682 until the American Revolution, William Penn and his successors as proprietaries and governors, and

the respective legislative assemblies above referred to, possessed and enjoyed the lands and waters within the boundaries of the Colony of Delaware as fixed by said deeds of feoffment and leases and exercised full and exclusive control and dominion thereover.

10. On March 22, 1682/3, by Letters Patent under the Great Seal of England, Charles II of England granted to his said brother, the Duke of York, the said lands and waters described in the said two deeds of feoffment and in the said two leases above referred to, which said Letters Patent conveyed said lands and waters in the following language:

> "All that the Town of Newcastle otherwise called Delaware and the fort therein or thereunto belonging scituate lying and being between Maryland and New Jersey in America And all that Tract of land lying within the Compasse or Circle of twelve miles about the said Towne Scituate lying and being upon the River of Delaware and all Islands in the said River of Delaware and the said River and Soyle thereof lying North of the Southermost part of the said Circle of twelve miles about the said Towne And all that Tract of Land upon Delaware River and Bay beginning twelve miles South from the said Towne of Newcastle otherwise called Delaware and extending South to Cape Lopen."

11. Said grant of March 22, 1682/3, was so made at the request and at the expense of William Penn, for the benefit of William Penn and delivered to William Penn, in fulfillment

of the covenants for further assurance contained in said deeds of feoffment of August 24, 1682.

12. Said Letters Patent of March 22,1682/3, were never thereafter surrendered, nor was the grant of lands and waters thereby made ever abandoned nor was its validity ever impaired by any act or proceeding.

13. The original of Exhibit 529 in this cause, being a certain document in the State archives of the State of Delaware, at Dover, is in fact the original Letters Patent of March 22, 1682/3, and the seal thereto attached is the Great Seal of England.

14. Prior to the Treaty of Peace between the United States of America and the Kingdom of Great Britain of September 2, 1783, the Province or State of New Jersey had at no time any title to any subaqueous soil of the Delaware River or Bay west of low water mark on the western shore of said Province or State of New Jersey.

15. By Orders in Council of November 13, 1685, and June 23, 1709, the claim of Lord Baltimore to the territory comprised within the three counties of Delaware was finally denied and said orders were never modified or reversed.

16. The said Order in Council of November 13, 1685, and the proceedings incident thereto recognized William Penn as the equitable owner of the Colony of Delaware.

17. By Order in Council of August 9, 1694, and by Letters Patent under the Great Seal of England of August 20,

1694, the title and possession of William Penn to the soil of the Colony of Delaware and the powers of government of William Penn thereover were duly and formally recognized, ratified and confirmed by the Crown of England.

18. By various and sundry acts of the Crown of England, its ministers and officers, from the year 1682 until the year 1776, the title and possession of William Penn to the soil of the Colony of Delaware, and the powers of government of the said William Penn, or his successors, and of the Delaware Assembly thereover were recognized and confirmed.

19. Neither the Crown of England nor its ministers or officers, at any time from the year 1682 until the year 1776, took or instituted any action or proceeding looking to the dispossession of William Penn and his successors from the administration of the government, or from the occupancy and possession of the soil of the Colony of Delaware. By reason thereof, the title of the said William Penn and his successors thereto and their powers of government thereover were ratified and confirmed by the Crown of England.

20. The State of Delaware at all times since 1783 has claimed, asserted and exercised exclusive dominion and jurisdiction over the lands and waters within the boundaries fixed by the said title deeds, as modified by the compact of 1905 between the States of Delaware and New Jersey. These boundaries include within their limits all that part of the Delaware River lying north of the southernmost part of a circle of twelve-miles radius from the Town of New Castle, Delaware.

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21. At no time has the State of Delaware ever abandoned its claim, dominion or jurisdiction over the Delaware River within said twelve-mile circle, nor has it at any time acquiesced in the claim of the State of New Jersey thereto, except as modified by the said Compact of 1905.

22. The State of New Jersey has at all times recognized the existence of a boundary dispute between the State of New Jersey and the State of Delaware, and by the Compact of 1905 between the said States the existence of such a dispute was expressly recognized.

23. That the erection and use of wharves and piers on the easterly side of the Delaware River by inhabitants of the Province of New Jersey and by citizens of the State of New Jersey was not a use of the subaqueous soil of said River hostile or adverse to the ownership of such soil by William Penn and his successors and by the State of Delaware.

24. By the Compact of 1905 between the States of New Jersey and Delaware the State of Delaware recognized the rights of riparian owners to wharf out on the easterly side of the Delaware River within the twelve-mile circle. By said Compact the State of Delaware did not convey to the State of New Jersey title to any part of the Delaware River or to any part of the subaqueous soil thereof, and said Compact did not in anywise alter or affect the boundaries of the respective states.

25. In 1783 the Delaware Bay was navigable by all sailing vessels in practically all parts of said Bay, with the exception of certain shoal waters.

26. There was in 1783 no well defined sailing channel in the Delaware Bay constituting a necessary track of navigation.

27. There was in 1783 no prevailing current or *filum aqua* in the Delaware Bay except tidal currents.

28. Neither the State of Delaware nor the State of New Jersey has exercised exclusive jurisdiction over the disputed territory in the Delaware Bay. The evidence establishes that the oyster beds within the disputed area in and about Ship John Light have been dredged by oystermen licensed by the State of Delaware and by oystermen licensed by the State of New Jersey.

CONCLUSIONS OF LAW.

1. By virtue of the issuance of the Letters Patent of March 22, 1682/3, a good title by estoppel in law passed to William Penn for the lands described in said Letters Patent, including the subaqueous soil of the Delaware River within the twelve-mile circle.

2. By virtue of the issuance of the Letters Patent of March 22, 1682/3, a good title by estoppel in equity passed to William Penn for the lands described in said Letters Patent, including the subaqueous soil of the Delaware River within the twelve-mile circle.

3. By virtue of the long uninterrupted and undisturbed possession by William Penn and his successors of the lands and waters comprised within the metes and bounds fixed in

the title deeds for the Colony of Delaware, William Penn and his successors acquired a good and valid title against the Crown of England to the lands and waters within said metes and bounds.

4. Said Letters Patent of March 22, 1682/3, were valid and effectual in fact and in law to convey the subaqueous soil of the Delaware River within said twelve-mile circle.

5. By the decision and decree of the Lord Chancellor of England in the case of *Penn v. Lord Baltimore,* decided by the Court of Chancery of England in 1750, the title of the successors of William Penn in and to the lands and waters comprised within the metes and bounds of the Colony of Delaware as fixed by its title deeds was adjudicated to be a good equitable title. By the decision and award of John Sergeant, Esq., arbitrator in the *Case of Pea Patch Island,* the title of the State of Delaware to the subaqueous soil of the Delaware River within said twelve-mile circle was adjudicated to be good and valid in law and in equity.

6. The preamble contained in the Act of the Delaware Legislature of February 7, 1794, does not in law constitute an estoppel or election binding upon the State of Delaware with respect to the source of the title of the State of Delaware to any of the lands or waters comprised within the metes and bounds of the State of Delaware.

7. The State of Delaware, upon acquisition of statehood on September 2,1783, succeeded to the title of William Penn, and to the title of the Crown of England, if any, to the lands and waters comprised within the metes and bounds fixed by the said title deeds above described.

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8. The boundaries of the colony of Delaware were fixed and determined by the Letters Patent of March 22, 1682/3, from Charles II of England to the Duke of York, and by virtue of the Treaty of Paris of September 2, 1783, the State of Delaware succeeded to dominion over the soil and waters within said boundaries.

9. The said Letters Patent of March 22, 1682/3, were not in fact or in law surrendered to the Crown, either by virtue of the bill of April 11, 1683, or by virtue of any other act or proceeding whatever.

10. There was in 1783 no well defined deep water sailing channel in the Delaware Bay constituting a necessary track of navigation and the boundary line between the States of Delaware and New Jersey in said bay is the geographical center thereof.

11. As a matter of convenience and necessity, the boundary line between the States of Delaware and New Jersey in that portion of the Delaware River south of the southerly perimeter of the twelve-mile circle and north of the head of Delaware Bay is the geographical center of said river.

Respectfully submitted,

REUBEN SATTERTHWAITE, JR.,
Attorney General of the
State of Delaware.

CLARENCE A. SOUTHERLAND,
Special Counsel.

APPENDIX 38 — REPLY BRIEF OF DEFENDANT ON EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER, *NEW JERSEY v. DELAWARE*, OCTOBER TERM, 1933 (EXCERPT, BOUNDARY IN THE TWELVE-MILE CIRCLE)

IN THE

Supreme Court of the United States.

No. 13 ORIGINAL. October Term, 1933.
(No. 19 ORIGINAL. October Term, 1929.)

STATE OF NEW JERSEY

Plaintiff,

v.

STATE OF DELAWARE,

Defendant.

Reply Brief of Defendant on Exceptions to Report of Special Master.

PERCY WARREN GREEN,
Attorney General of the State of Delaware

REUBEN SATTERTHWAITE, JR.,
CLARENCE A. SOUTHERLAND,
Special Counsel for the State of Delaware

WARD & GRAY,
Of Counsel.

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[table of contents intentionally omitted]

REPLY BRIEF OF DEFENDANT.

This reply brief will be devoted to answering certain arguments advanced in Plaintiff's first brief and will follow the subject headings in Plaintiff's brief.

Plaintiff's brief, like Defendant's, treats the questions under the two separate headings of "The Boundary Within the Twelve-Mile Circle" and "The Boundary Below the Circle".

BOUNDARY IN TWELVE-MILE CIRCLE

Before considering in detail the specific points advanced in this portion of Plaintiff's brief we desire to invite the Court's attention to the general nature of Plaintiff's claims.

Plaintiff's brief on this branch of the case is devoted, first, to an attempt to establish title by prescription in the State of New Jersey to the subaqueous soil of the Delaware River; and second, to an attack on the Delaware title.

Under part II of the brief under the heading "The Title of the State of New Jersey", Plaintiff apparently concedes that, as found by the Master (Report, p. 8, p. 75, Finding 14), the Province of New Jersey had at no time, prior to statehood, any record title to the subaqueous soil of the Delaware River. No attempt is made to set up a record title from the Crown or from the Duke of York.

Plaintiff, however, claims that in colonial times certain riparian rights came into existence which, it argues, are

inconsistent with the claim of title by the State of Delaware. Plaintiff further argues that the Master's finding that the State of Delaware at all times exercised exclusive jurisdiction and domination over the Delaware River within the twelve-mile circle is not supported by the evidence. Plaintiff further claims that the State of New Jersey, after statehood, as well as the Province of New Jersey before statehood, exercised jurisdiction over the Delaware River and thus acquired title by prescription.

Plaintiff's claim to title to the eastern half of the river within the twelve-mile circle thus rests, according to its brief, solely on prescriptive rights. No suggestion of a record title is made.

We shall now consider the nature of the evidence on which Plaintiff relies to establish prescription.

II. (c) (1). Pages 14-35. Practical Construction of Boundary. Action of Penn and the Proprietors: Estoppel.

Under this heading Plaintiff sets forth quotations from various Exhibits the purport of which is that the inhabitants of West New Jersey were entitled to the use of the Delaware River for navigation. This may be conceded at once. Plaintiff argues that such rights to navigation were entirely inconsistent with the ownership of the subaqueous soil by William Penn as proprietary of Delaware. Plaintiff says, in effect, that the acquisition of title to the subaqueous soil of the river by Penn would "thereby exclude the inhabitants of West Jersey (and later of New Jersey)" from the use of the Delaware River. Therefore, Plaintiff argues, it is contrary to

equity that William Penn, who was a trustee for certain land owners in New Jersey, should claim any advantage, under his grants from the Duke of York to the prejudice of the interests of his associates or *his cestuis que trustent.* Plaintiff concludes (Brief, pp. 32-35) that Penn is thereby estopped to claim title to the subaqueous soil of the Delaware River under his grant from the Duke of York and the Royal Patent to the Duke of York which inured to Penn's benefit.

The entire argument is founded upon a misconception of the nature of the rights acquired by the inhabitants of New Jersey. The right to use the river for navigation is in no way inconsistent with the ownership of the bed thereof by an adjoining State. Instances are common in the United States of the ownership of the entire bed of a river by one State to the entire exclusion of the other State from *title* to the soil of the river. For instance, Maryland owns the bed of the River Potomac. Such ownership, of course, in no way affects the rights of the inhabitants of the other State to use the river for purposes of navigation. The claim that ownership of the soil of the Delaware River by the State of Delaware would exclude the inhabitants of the State of New Jersey from the use of the river needs only to be stated to show its unsoundness. No such claim has ever been made by the State of Delaware. It could not be sustained for a moment.

Yet practically the entire argument in Plaintiff's brief from pages 14 to 35 is devoted to showing that the inhabitants of New Jersey had the use of the Delaware River. This is entirely correct but such use in no sense establishes a prescriptive title to the soil of the river.

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Certain assertions in this portion of the brief which are not supported by the evidence should be briefly noticed. At page 29 it is stated that William Penn never claimed title to any land within a radius of twelve miles east of the river. If by this is meant the New Jersey upland, it is entirely correct. The statement is then made that William Penn "never claimed any part of the river itself".

In our first brief we have pointed out that as early as April, 1683 William Penn instructed his Commissioners to insist on his title to the river, stating that the inhabitants of New Jersey *had the liberty of the river but not the property.* (Exhibit 52, p. 3.)

As stated in our original brief, William Penn in 1701 made a general grant to owners of riparian lands in the town of New Castle of a tract of subaqueous soil extending 600 feet into the Delaware River for the purpose of the erection of wharves, and thereafter nineteen "bank lots" or "water lots" were actually granted to riparian owners. (Exhibits 571-590; 594-610.) If William Penn had title to the western half of the bed of the Delaware River, he likewise had title to the eastern half. The assertion, therefore, that he "never claimed any part of the river itself" is entirely erroneous.

Reference is made to certain instructions of the Crown of March 15, 1683-4 to the Governor of West Jersey respecting the restraint and punishment of pirates. Of course, the enforcement of the Crown laws against piracy in the Delaware Bay or on the high seas has not the slightest relation to the ownership of the subaqueous soil of the Delaware River.

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II. (c) (2). Riparian Rights and Grants. Brief, pp. 35-69. (3). Several and Common Fisheries. Brief, pp. 69-70.

Under these headings of the brief Plaintiff discusses common law rights in tidal waters and certain modifications of the common law that arose in New Jersey and other American colonies.

The argument appears to be made that the acquisition of such rights was in some way inconsistent with the ownership of the soil by William Penn and operated to defeat his title to the bed of the Delaware River east of the main ship channel within the twelve-mile circle.

It is further argued that the use of the subaqueous soil of the river by citizens of New Jersey for the purpose of erecting wharves giving them access to the river is a use of the soil inconsistent with the title of the State of Delaware. From this Plaintiff argues in some way that we cannot understand that thereby *title* to the entire bed of the river east of the ship channel passed to the State of New Jersey by prescription.

The answer to this entire argument is that the use of subaqueous soil by riparian owners in New Jersey for the purpose of erecting wharves to provide access to navigable waters is in no way inconsistent with the ownership of the soil by William Penn or the State of Delaware.

Plaintiff's argument seems to be as follows:

The sovereign owns the foreshore, i.e., the strip of land between high water mark and low water mark. No structure

can be erected on the foreshore or indeed on the subaqueous soil beneath tidal waters without the consent of the sovereign.

This was the law of England but, as Plaintiff has shown, it was never the law of the American Colonies and was never the law of the Colony or State of Delaware. In New Jersey the common law rule that the State owns the foreshore has always been followed, i. e., the riparian owner owns only to high water mark. In Delaware, however, the riparian owner holds to low water mark.

Harlan & Hollingsworth v. Paschal, 5. Del. Ch. 435;

State v. Reybold, 5. Harr. 484, 486.

As Plaintiff correctly says, this modification of the English Law is undoubtedly due to custom and usage. Likewise to custom and usage comes the right of the riparian owner to wharf out to navigable water. This custom and usage became very firmly fixed in American Colonial Law and the law in most of the States of the Union recognizes the right of a riparian owner, in the absence of legislative restriction, to wharf out for the purpose of obtaining access to the navigable portion of the river.

See the discussion in Volume 1, Farmham on "Waters and Water Rights," sections 62-66; and the review of the State decisions by Mr. Justice Gray in *Shively v. Bowlby*, 152 U.S. 1.

The courts of the State of New Jersey, however, not recognizing the *title of* the riparian proprietor below high

water mark, have of necessity somewhat limited these rights. In the State of New Jersey the riparian owner has no title below high water mark. This was the common law of England. The right of the riparian owner in New Jersey to wharf out is not based on any, theory of title to the foreshore or to the subaqueous soil of the river. It is a right which is in the nature of a burden upon the ownership of the foreshore and subaqueous soil. It is a right which is recognized at least as fully, if not more fully, by the laws of the State of Delaware *The holder of such a right does not hold it adversely to the State as the owner of the subaqueous soil but in effect derives it from the State.*

It follows, therefore, that the existence of this right and its use by the erection of a wharf is not an act which is hostile to the State as owner and can not be made the foundation for a claim of adverse possession.

The New Jersey doctrine of riparian rights is stated in *State v. Jersey City*, 25 N. J. Law 525, by Judge Elmer of the New Jersey Supreme Court, as follows:

> "It must now be accepted as the established law in New Jersey, that the right of the owner of lands bounding on a navigable river extends only to the actual high water mark, and that all below that mark belongs to the state. The inchoate right, if such it may be called, which the proprietor of the upland has, either with or without a license, to acquire an exclusive right to the property, by wharfing out or otherwise improving the same, gives him no property in the land while it remains

under the water. It may be granted by the state to a stranger, at any time before it is actually reclaimed and annexed to the upland. Such is unquestionably the common law, and I am aware of no alteration of it in this respect in New Jersey. Some of the judges seem to have expressed a different opinion in the case of *Bell v. Gough*, before the Court of Errors, but no case has been decided which establishes a different doctrine. In that matter, I concur myself with the opinion expressed by Judge Randolph. 2 *Zab.* 491. If the blocks and lots covered with water had been in this case valued and assessed entirely distinct from the upland, I should have felt constrained to hold that the assessment could not be supported."

It is clear that before the New Jersey legislature undertook by various riparian acts to protect the riparian rights of the owners of the upland the common law prevailed and was modified only in so far as the riparian owner actually reclaimed the shore or exercised his riparian right by the actual erection of a wharf.

It follows from the foregoing that the recognition of such riparian rights in colonial times never had the effect of passing *title to the soil* to the riparian owner. *Much less did it have the effect of vesting title in the province of New Jersey to the bed of the river east of the main ship channel.*

We agree with the statement that under colonial usage and custom in both the Province of New Jersey and the Colony of Delaware riparian rights sprang up, unknown to

the English common law. What of it? Such rights are in no wise inconsistent with the fact that the ownership of the subaqueous soil was vested in William Penn, and the recognition of such rights could not avail to change the boundaries of the colonies.

We are here concerned with a question of title and boundaries. If the riparian owner's right to wharf out vested in him no title to the foreshore or the subaqueous soil of the river then the title thereto remained unaffected by the existence of the right. Moreover, that right flowed from custom and usage sanctioned by the proprietaries of both colonies. It is elementary that one who claims a right derived as grantee of another does not hold adversely to the other and can not by the exercise of that right acquire title by adverse possession.

The conclusion, therefore, is that the exercise of riparian rights by the inhabitants of the Province of New Jersey was not in any sense hostile or adverse to the ownership of the soil by William Penn. It was a right which he and all other proprietaries of American colonies accorded to the inhabitants of those colonies.

Plaintiff is here seeking to establish *title* to the subaqueous soil of the Delaware River east of the main ship channel. Such title can not be established by pointing to the exercise of riparian rights by the inhabitants of the Province of New Jersey. Even if it could be argued that the riparian owner acquired title by adverse possession to the subaqueous soil underneath the wharf erected by him, such adverse

possession would not inure to the benefit of New Jersey and would not shift the boundary line between the States.

To put the matter in another way, the right of the riparian owner to wharf out does not rest upon title to the subaqueous soil, and a claim to ownership of the subaqueous soil by the State of Delaware is not inconsistent with the use of such subaqueous soil by the riparian proprietor for the purpose of wharfing out.

Let us suppose that after a lapse of time a riparian owner who has erected a wharf upon subaqueous soil in front of his property tears down that wharf and does not rebuild it. Surely it can not be said that he holds title to the subaqueous soil which is no longer covered by a wharf. He still has the right to build another wharf, but the ownership of the soil is not thereby changed.

Let us suppose again that a valuable mineral deposit is found in the subaqueous soil of the river within the area circumscribed by the piling of the wharf erected by the owner of the upland. Could it be contended for a moment that the owner of the upland, by virtue of his having erected a wharf, would have any title to such deposits? Clearly not. Nor could the riparian owner contend that by virtue of his long possession of the wharf he had acquired a title by prescription to the subaqueous soil.

Moreover, as pointed out in our original brief, nearly all the New Jersey grants of riparian rights within the twelve-mile circle, and practically all the improvements on the New Jersey shore within the twelve-mile circle, were

made or built after the institution of the prior suit in 1877. The failure of the State of Delaware to attempt to tax these improvements during the pendency of this suit can not be ascribed to laches nor can any acquiescence be imputed to the State during that time.

It should be further noted that the State of Delaware has never questioned the right of citizens of New Jersey to wharf out to navigable water nor can such a right be questioned now because it is clearly protected by the Compact of 1905 between the States.

The point of the matter lies in this: That the exercise of riparian rights by the inhabitants of the Province of New Jersey, and by the citizens of the State of New Jersey is in no way adverse to the title of the State of Delaware. The Special Master so held. We quote from his report as follows:

> "The claim of defendant in the case is, to low water mark on the New Jersey shore within the twelve-mile circle and defendant claims that there is nothing inconsistent between the ownership of the subaqueous soil and the exercise of riparian rights along the river front. There is no evidence in the case of any such adverse exercise of rights by riparian owners as could give rise to prescriptive rights on the part of the plaintiff. The number of grants and improvements thereunder made upon the plaintiff's shore were few, as above pointed out, and in no view of the matter could the exercise of riparian rights change

the title to the river or affect the boundary between the plaintiff and the defendant." (Report, pp. 53-54.)

In concluding our discussion of this point we should notice an assertion in Plaintiff's brief to the effect that the State of Delaware "never asserted or claimed title to the bed of the river east of the ship channel until 1872." (Brief, p. 63.)

The Master found on the evidence that from 1682 until the American Revolution William Penn and the Pennsylvania and Delaware Legislative Assemblies exercised exclusive control over the lands and waters within the boundaries of the colonies of Delaware. (Report, p. 74, finding 9.)

The Master further found that since 1783 the State of Delaware has claimed, asserted, and exercised exclusive dominion and jurisdiction over the lands and waters within the boundaries fixed by the title deeds as modified by the Compact of 1905 between the States, and that at no time has it ever abandoned its dominion or jurisdiction or acquiesced in the claim of the State of New Jersey except as modified by the Compact. (Report, pp. 76-77, findings 20-21.)

It would be a tedious process to review all the evidence which disproves the above assertion in Plaintiff's brief and sustains the Master's finding. See Defendant's first brief, pp. 90-105. It will be sufficient here to quote from Plaintiff's own brief statements wholly inconsistent with this contention. On page 121 of Plaintiff's brief Plaintiff argues in effect that there was a subsisting dispute between New

Jersey and Delaware over the boundary line prior to the suit of 1877 and in support thereof cites the Delaware case of *State v. Morris*, 1 Harr. (Del.) 326. The opinion of Chief Justice Harrington in this case shows conclusively the existence of the long pending dispute between the States over the boundary line. We quote the following:

> "The state of Delaware has uniformly claimed the sole and exclusive jurisdiction over the whole of the Delaware bay to low water mark on the Jersey shore, and it has to a certain extent used and exercised jurisdiction over the bay and river by grants of territory, acts of restrictive legislation, and service of process. On the part of the United States there has been no resistance of this claim; but, on the contrary, such acknowledgment of the state's jurisdiction as can be inferred from the acceptance on several occasions of cessions by this state of certain parts of the bay and river for the purpose of erecting forts, piers and breakwaters, for defence against the enemy, or for the protection of commerce. On the part, also, of the state of New Jersey, this claim, though resisted in its full extent, has been partially acceded to and acknowledged, that state having limited her claim of jurisdiction to the main ship channel of the bay. There have been several efforts made by New Jersey to settle this question of boundary between us, and it is to be regretted that our legislature has not acceded to the proposition for a conventional arrangement, or adopted some other course to establish the validity of our claim. So

long back as 1782, John Dickinson, in a message to the general assembly of this state, informed that body that a resolution had been adopted by the legislature of New Jersey appointing commissioners 'for settling and establishing the line of jurisdiction between that state, Pennsylvania and this state;' that commissioners had also been appointed by the state of Pennsylvania; and he gave it as his opinion that such a measure was 'proper to be taken on our part for settling the line of jurisdiction in the bay and river Delaware.' The recommendation was not acted upon by the assembly, and though similar propositions have since been made by New Jersey, they have never been acceded to. The convention went on between New Jersey and Pennsylvania, and resulted in an amicable division of the islands, &c. within the river, and an agreement that each state should enjoy and exercise, under certain restrictions, a concurrent jurisdiction upon the waters of the river; but that all capital and other offences committed on the river, the juridical investigation and determination thereof should be exclusively vested in the state wherein the offender should be first apprehended, arrested or prosecuted.

"In November, 1820, the legislature of New Jersey passed a law authorizing the governor to appoint commissioners to meet commissioners to be appointed by this state for the purpose of settling the boundary line between the states and

defining the jurisdiction of each. The subject was laid before our legislature and referred to a committee, who reported that it was inexpedient at that time to appoint commissioners for this purpose."

In Plaintiff's brief at page 332 it is said:

"Prior to 1835 Chief Justice Harrington of the Delaware Supreme Court discussed this boundary dispute in his decision in State v. Morris (reported as a *note to* Emory v. Collies, 1 Harr. Del. 326), in which he reviewed the controversy between the two states over this boundary line from 1782 to the date of that decision, referring to official action taken by each state during that period."

Finally, on page 343, Plaintiff admits very frankly that:

"The record in this case shows that the river boundary between the two colonies was in dispute as early as 1782, . . ."

The evidence which conclusively shows the continued exercise of dominion over the river by the State of Delaware from the Revolution onward is set forth in detail in our first brief, pages 90 to 105. The bare assertion on page 63 of Plaintiff's brief that the Defendant never asserted or claimed title to the bed of the river east of the ship channel until 1872 is simply contrary to all the facts of the case and contrary to assertions made elsewhere in the same brief.

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One further assertion in this portion of Plaintiff's brief should be noticed. On page 65 it is said:

> "Plaintiff's title and jurisdiction, by prescription, in Delaware river and bay were adjudicated as part of the *res gestae* by *Justice* Washington, in 1825, in *Corfield v. Coryell* (6 Fed. Cas. 546); by *Chief Justice* Tilghman in *Kean v. Rice*, in 1824, (11 Sargeant & Rawl's Rep. 203); and by *Justice* Baldwin, in 1830, in *Bennett v. Boggs* (1 Bald. 60) and in 1836 in (*Gale v. Behling*) (Ex. 219)."

The case of *Corfield v. Coryell*, 4 Wash. C. C. 371, 6 Fed. Cas. 546, so far from sustaining the New Jersey title to the subaqueous soil of the river, expressly holds that no such title existed. We quote the following from that case:

> "The next general question to be considered is, whether the boundaries of the state of New Jersey include the place where the Hiram was seized whilst engaged in dredging for oysters? The grant from Charles II to his brother, the Duke of York, of the territory of which the present state of New Jersey was a part, dated the 12th of March 1663-4, was of all that territory lying between the rivers St. Croix adjoining Nova Scotia, and extending along the sea coast southerly to the east side of Delaware bay, together with all islands, soils, rivers, harbours, marshes, waters, lakes, fishings, huntings and fowlings, and all other royalties, profits, commodities, hereditaments and

appurtenances to the same belonging and appertaining, with full power to govern the same. The grant of the Duke of York dated the 24th of June 1664, to Lord Berkeley, and Sir George Carteret, after reciting the above grant, conveys to them all that tract of land lying to the westward of Long Island and Manhattan's Island, bounded on the east, part by the main sea, and part by Hudson's river, 'and hath upon the west Delaware bay or river, and extendeth southward,' &c. with all rivers, fishings, and all other royalties to the said premises belonging, &c. There is no material difference between these grants as to the boundaries of New Jersey on the westward; and we are of opinion that, although the rule of the law of nations is, that where a nation takes possession of a country separated by a river from another nation, and it does not appear which had the prior possession of the river, they shall each extend to the middle of it; yet, that when the claim to the country is founded, not on discovery and occupancy, but on grant, the boundary on the river must depend upon the just construction of the grant, and the intention of the parties to be discovered from its face. Taking this as the rule, we think the claim of New Jersey under these grants to any part of the bay or river Delaware below low water mark cannot be maintained. The principle here suggested is, we conceive, fully recognized and adopted by the supreme court in the case of Handly's Lessee v. Anthony, 5 Wheat. (18 U. S.) 374. Neither do we conceive that the

> limits of the state can, by construction, be enlarged in virtue of the grant of all rivers, fishings, and other royalties; which expressions ought, we think, to be confined to rivers, fishings and royalties within the boundaries of the granted premises."

The case also holds that the inhabitants of West New Jersey made use of the Bay and River Delaware for the purposes of navigation and fishery. As above pointed out, this right is unquestioned and in no way affects the title of the State of Delaware.

The case of *Kean v. Rice*, 12 Serg. & R. (Pa.) 203, deals with oyster rights in Maurice River Cove, in the Delaware Bay, far outside of the twelve-mile circle. It has nothing to do with the present dispute. The case of *Bennett v. Boggs*, 1 Bald. 60, 3 Fed. Cas. 221, deals with fishing rights in the Delaware River between Pennsylvania and New Jersey, north of the twelve-mile circle, and is likewise not on the point.

The case of *Gale v. Beling*, unreported, will be hereafter discussed. It is sufficient to point out here that the record title of the State of Delaware, based on the Letters Patent of March 22, 1682/3, was not shown to the court, and the charge on the law was therefore founded on an error of fact.

In conclusion we would point out that even if it were true that the possession of subaqueous soil by riparian owners for the purpose of erecting wharves were hostile or adverse to the State of Delaware the only result would be that such wharf owners would acquire good title against the State of

Delaware by adverse possession. But such adverse possession could not avail to transfer title to such wharf lands to the State of New Jersey. The land would be owned in private ownership by the riparian owners but would still be within the boundaries of the State of Delaware. Much is said by the Plaintiff, in this portion of the brief, of the great value of these wharf rights on the New Jersey side. The implication in the brief is that if the boundary line between the States is determined to be low-water mark on the New Jersey shore the interests of the riparian owners will be either destroyed or seriously prejudiced. This, of course, is simply not the fact. The Compact of 1905 above referred to recognized the rights of riparian owners in the river to wharf out, and the Master so found.

We quote the following from his report:

> "By the Compact of 1905 (Exhibit 53) the two States agreed, among other things, each with the other as follows
>
> 'Art. VII. Each State may, on its own side of the river, continue to exercise riparian jurisdiction of every kind and nature, and to make grants, leases, and conveyances of riparian lands and rights under the laws of the respective States.
>
> 'Art. VIII. Nothing herein contained shall affect the territorial limits, rights, or jurisdiction of either State of, in, or over the Delaware River, or the ownership of the subaqueous soil thereof, except as herein expressly set forth.'

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"Under this Compact clearly all improvements made by riparian owners upon the shore of either State are protected, and any decree fixing the boundary between the plaintiff and the defendant must so provide." (Report, p. 54.)

II. (c) (4). The Circular Boundary. Brief, pp. 70-88.

Plaintiff's brief discusses the origin and development of the twelve-mile circle, and the point is made that the circle originated in an arc starting on the Delaware River and running to the intersection of the arc with the fortieth degree of northern latitude. This is undoubtedly correct. Plaintiff then proceeds to argue that when the deeds of feoffment were executed it was the intention merely to preserve the arc as a boundary between Delaware and Pennsylvania and that the word "circle" did not mean "circle" but was merely descriptive of the boundary between Delaware and Pennsylvania.

This argument is defeated by the wording of the deed of feoffment. In conveying the bed of the river the language used is: "the said river and soil thereof lying north of the southernmost part of the said circle of twelve miles about the said town." Obviously if the circle was intended to be only an arc between New Castle County, Delaware, and Delaware County, Pennsylvania, the above quoted language would be meaningless. To give it any meaning at all it is necessary to extend the circle to the New Jersey shore.

In this portion of the brief Plaintiff also discusses various surveys of the circular line. It is quite natural that any survey

should refer to the circle as beginning on the westerly side of the Delaware for the obvious reason that a survey of a boundary line in a navigable river would be a useless proceeding as the boundary could not be marked in the river.

Considerable stress is laid on the fact that in referring to Delaware various documents speak of the Colony of Delaware as lying "on the west side of said river and bay". Numerous instances of this sort are quoted at great length.

We are unable to see how a reference to the Colony of Delaware as lying on the western side of the Delaware River and Bay raises any inference that the charter to the Colony of Delaware did not include the bed of the river. Yet this seems to be the inference that Plaintiff seeks to draw.

All of the argument under this heading, however, is beside the point. If the river was included in the deed what difference does it make whether the northern arc of the circle was regarded as extending to the New Jersey shore? The point of the matter is that the deed clearly conveyed the bed of the Delaware River north of the southern arc of the circle.

II. (c) (5). Boundary Laws and Maps. Brief, pp. 89-107.

Plaintiff's brief discusses in detail the various maps in evidence, which are styled "boundary maps." We repeat, as stated in our original brief, that none of the old maps of Delaware and New Jersey undertook to fix the boundary at all, and the inference that Plaintiff seeks to draw (Brief, p. 346), that a map maker would have indicated any boundary

fixed by grant, presupposes a knowledge of the various colonial grants which no map maker would be likely to have. In fact some of the maps in evidence upon which Plaintiff lays great stress show an incorrect boundary between Maryland and Virginia.

The maps in evidence in the preparation of which great care was taken accurately to ascertain boundaries are the United States Geological Survey maps (Exhibits 720, 724, 726), which show the eastern boundary of Delaware on the New Jersey shore within the twelve-mile circle. These maps have been followed generally by map makers in this section. (Exhibits 721, 722, 723.)

In *Louisiana v. Mississippi*, 202 U. S. 1, 55-56 this Court recognized as of evidential value a bulletin of the United States Geological Survey discussing State boundaries.

II. (c) (6). Exercise of Jurisdiction. Brief, pp. 108-123.

Under this heading Plaintiff's brief discusses the exercise of jurisdiction over the Delaware River by the provincial and state governments of New Jersey and Delaware.

There is considerable discussion of the enforcement of the Admiralty laws by the Crown authorities in the Delaware River and Bay. This is beside the point. Admiralty powers were exercised by the Crown authorities and the Admiralty Courts were Royal Courts. Such powers were exercised alike over proprietary governments and Crown colonies. The exercise of such powers was in no sense inconsistent

with the ownership of the soil of the river by one of the colonial proprietaries.

Plaintiff details certain instances of the exercise of jurisdiction by the State of New Jersey. The principal instances cited are cessions of lands to the United States in the Delaware River and certain arrests for violation of the New Jersey fishing laws. The record shows an equal number of cessions by the State of Delaware to the Federal Government within the twelve-mile circle. See our first brief, pp. 99-100. In view of the well-known boundary dispute between New Jersey and Delaware it is not surprising that the United States Government should have sought to obtain cessions from both States. This fact is merely a proof of the continued existence of the dispute.

One of the instances of the arrest of fishermen in the Delaware River is subsequent to the Compact of 1905 and the other one occurred during the pendency of the prior suit between the States.

These are all of the instances which the Plaintiff is able to cite of the exercise of jurisdiction by the State of New Jersey within the twelve-mile circle on the Delaware River.

On the other hand the record on behalf of the State of Delaware is replete with instances where process issued by Delaware courts has been served on vessels in the eastern half of the Delaware River within the twelve-mile circle. See the extract from Mr. Sergeant's opinion in the case of Pea Patch Island quoted in our first brief, pages 96 to 98, and numerous instances of the service of process on boats

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on the New Jersey side of the main ship channel within the twelve-mile circle testified to by the witnesses in the prior suit between the States. (First brief, pp. 98-99; Exhibits 691, 698, 700, 702, 704, 706, 710, 714, 718.)

Commenting on this testimony, which is conclusive as to the actual exercise of jurisdiction by the Delaware courts, Plaintiff's brief says:

> "The testimony of witnesses in that case in 1905, even though they are all dead, is not admissible in this case on another issue a quarter of a century later. 1 *Greenleaf on Evidence*, 201. It should be disregarded by the court."

Plaintiff apparently concedes the rule that the testimony of a deceased witness in a former trial between the same parties dealing with the same issue is admissible, if the right of cross-examination has been accorded. It is contended, however, that the present case does not present the same issue as the prior suit.

It therefore becomes necessary to examine the pleadings filed in the former suit to determine what were the issues there presented to the court. The bill of complaint filed by the State of New Jersey and the answer of the State of Delaware are found in Exhibit 693. The second paragraph of the bill of complaint reads, in part, as follows:

> "That your orator is the owner in fee simple of a portion of the bed of the Delaware river, that is to say, from the southeasterly corner of the State

of Pennsylvania, on said river, down said river to and into Delaware bay. That within the limits aforesaid, your orator's part of the bed of said river extends from the New Jersey shore thereof to the middle of said river." (Exhibit 693, p. 1.)

The bill of complaint derives the title of the State of New Jersey to the eastern half of the river from the Crown of England at the time of the Treaty of Paris of 1783.

In paragraph J of the bill the following appears:

"J. By the American Revolution which took place by the declaration of Independence bearing date the 4th day of July 1776, the State of New Jersey became, and was, and from thence forth has been a free and independent state, and as such became entitled to have and to hold such rights as free and independent states may have or hold, to do all acts and things which independent states may of right do, and by force of the said revolution and said independence the said State of New Jersey became invested not only with all and every power of government in and over the territory of said state and the tide-waters adjacent thereto, but also became invested with all the property, and rights of property, within and appertaining to said state, which immediately before said revolution were vested in the crown of England; that at the time the said revolution took place the bed of the River Delaware in its whole width and length, from the falls in said river

at or near Trenton, to the mouth of said river—that is, throughout the whole extent to which the tide ebbed and flowed in said river-belonged to and was vested in the crown of England in trust for the uses and purposes of the subjects of the King of Great Britain; that by means of the said revolution, the said independence of the State of New Jersey, and the treaty of peace between the King of Great Britain and the United States of America, concluded at Paris, Sept. 3rd, 1783, that portion of the bed of the Delaware River, last therein before mentioned, situate between the States of New Jersey and Delaware, to the middle of said River, became vested in fee simple in the State of New Jersey; the remaining portion thereof, by the same means and at the time being vested in the State of Delaware; and so the title to the bed of said river, your orator respectfully submits, hath ever since continued and now is." (Exhibit 693; p. 17.)

In paragraph K of the bill (Exhibit 693, p. 19) it is alleged that the State of New Jersey has title to the bed of the Delaware River as claimed by a long, peaceable and undisputed possession, use, and enjoyment.

The prayers of the bill included a prayer *that the true boundary line between the States may be ascertained and established;* and also that the jurisdiction of the State of New Jersey over the Delaware River be ascertained and established. (Exhibit 693, p. 40.)

It is quite true that the particular dispute which precipitated the suit of 1877 was a dispute over fishing rights,

just as the present suit was precipitated by a dispute over oyster beds; but the bill of complaint filed by the State of New Jersey did not limit the Supreme Court of the United States to the adjudication of fishing rights, any more than the present bill of complaint limits the question to the ascertainment of the right to dredge oysters in certain disputed territory. As above pointed out, the bill filed in 1877 specifically put in issue the title and jurisdiction of the States over the bed of the river and prayed that the boundary line be ascertained.

The bill of complaint in the present suit presents the same issues within the twelve-mile circle. It is alleged in paragraph five that the State of New Jersey claims the ownership in fee simple of that portion of the subaqueous soil lying east of the thalweg, and the State of Delaware claims the entire bed of the river to low-water mark on the New Jersey shore within the twelve-mile circle.

The title of the State of New Jersey to the upland is traced to the grant to the Duke of York in 1664, as in the former suit, and the title to the eastern half of the river is derived from the Treaty of Peace with England as alleged in the former bill. (Rec., pp. 5-12.)

The prayers of the present bill are, inter alia, that the true boundary line between the States may be ascertained, declared, and perpetually established. (Rec., p. 17.)

In each case the defendant filed an answer denying the ownership of the State of New Jersey to the eastern half of the river within the twelve-mile circle, each case basing its

title on the deeds of feoffment from the Duke of York and the letters patent to the Duke of York of March 22, 1682/3.

Paragraph 24 of the bill of complaint in the present suit reads as follows:

> "24. The dispute between the plaintiff and the defendant, and their officers and citizens, respectively, concerning the boundary line between the two States in the Delaware River and Bay and concerning the territorial ownership of the bed of said river and bay as between said States, has existed for many years and the question has arisen from time to time and negotiations have been conducted between the plaintiff and the defendant, and between commissions appointed by the Legislatures thereof, respectively, for the purpose of settling the dispute, and the plaintiff, by leave of this court, filed its bill of complaint against the defendant on March 13, 1877, praying that the true boundary line between the plaintiff and the (14) defendant might be ascertained, declared, defined and perpetually established, and that the rights of the parties in the bed of said river and the territorial extent thereof might be ascertained, declared and established. An answer was filed therein on October 14, 1901, and a replication thereto was filed November 26, 1901, but said suit was discontinued by consent of the parties, under the provisions of an agreement or compact between the parties in 1905 and the

question of boundary and territorial ownership were left undetermined." (Rec., p. 13.)

It should be noted that this paragraph asserts that the suit of 1877 was a suit to settle the boundary line between the States. The Plaintiff's bill herein filed has therefore adopted our view of the matter.

The foregoing analysis of the pleadings would seem to make it quite clear that the issue involved in the first suit in 1877 is one of the issues involved in the present suit, viz.: the title of the two States to the easterly half of the Delaware River within the twelve-mile circle from New Castle.

This having been shown, it follows that the testimony to which objection has been made is admissible, it having been given in a judicial proceeding, the right to cross-examine having been accorded, and the witnesses being deceased.

Plaintiff seeks to treat this evidence as not entitled to any consideration because it represents merely the recollection of the witnesses and is not substantiated by court records.

The witnesses were cross-examined and no contention was made that the instances of actual exercise of jurisdiction testified to by them did not take place. Their testimony is not limited to mere expressions of opinion but is positive and clear as to the actual serving of civil process on vessels in the eastern half of the Delaware River within the circle. The original writ of attachment or summons would not itself disclose where the writ was served. The only possible way

to prove where the writ was served was to call the various marshals and deputy marshals who served such writs and the lawyers who knew of the service of the writs in the eastern half of the Delaware River. This was done and their testimony was not impeached or shaken in any respect whatsoever. It is direct and positive evidence in this case of the exercise of civil jurisdiction over the eastern half of the river by the Delaware courts.

Similar testimony was produced in the case of Pea Patch Island before Mr. Sergeant the arbitrator and is summarized by him in the extract from his opinion in our first brief, pages 96 to 98 above referred to.

Not one single instance of the service of a writ of summons or attachment on a vessel in the eastern half of the circle from the United States court for the district of New Jersey is offered by the Plaintiff. In view of this fact and of the evidence above referred to it is not surprising that the Master's finding on this point was as follows:

> "20. The State of Delaware at all times since 1783 has claimed, asserted and exercised exclusive dominion and jurisdiction over the lands and waters within the boundaries fixed by the said title deeds, as modified by the compact of 1905 between the States of Delaware and New Jersey. These boundaries include within their limits all that part of the Delaware River lying north of the southernmost part of a circle of twelve-miles radius from the Town of New Castle, Delaware." (Report, p. 76.)

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II. (c) (7). The Compact of 1905.

Under this heading Plaintiff's counsel claim that by the Compact of 1905 between the States the State of Delaware ceded to the State of New Jersey "title to the subaqueous soil of the river, within a radius of twelve miles of New Castle, to the extent necessary to accommodate navigation and commerce to the industries which have developed, and used or may develop and use, the subaqueous soil on that side."

We may ask at once: Why, if the Compact intended any such result, did it not expressly so state? The fact is that the Compact of 1905 reserves the question of the boundary line between the States. By the Compact (Exhibit 53) the State of Delaware in Article I ceded to the State of New Jersey authority to serve criminal and civil process over the entire Delaware River, except upon Reedy and Pea Patch Islands, not including, however, vessels moored at wharves on the Delaware side of the river.

By Article III a common right of fishery in the inhabitants of both States was recognized to exist in the Delaware River.

The effect of Article VII of the Compact, quoted in Plaintiff's brief (p. 127) was that the State of Delaware recognized the rights of the inhabitants on the east side of the river to wharf out to navigable water. This right had never been questioned and was undoubtedly inserted to put beyond question the *riparian rights* (as distinguished from *title*) of land owners in New Jersey.

Article VIII then provides as follows:

> "Nothing herein contained shall affect the territorial limits, rights, or jurisdiction of either State of, in, or over the Delaware River, or the ownership of the subaqueous soil thereof, except as herein expressly set forth."

The Master's finding that this Compact in no way affected the boundary line between the States but merely protected the rights of the riparian owners on the Jersey shore is obviously sound. If the Compact intended to cede to New Jersey title to the subaqueous soil it undoubtedly would have so provided.

Plaintiff is here met with an insuperable difficulty. If the Compact of 1905 was a cession of land, the question arises, How much land was ceded? Apparently Plaintiff's counsel contend that there was ceded to New Jersey a vague and uncertain quantity of land "to the extent necessary to accommodate navigation and commerce to the industries which have developed, and used, or may develop and use, the sub-aqueous soil on that side". This is a wholly untenable position. If sound, the boundary line would be forever uncertain. It would depend on the extent to which it may hereafter become necessary to develop and use the lands below low-water mark on the New Jersey shore.

Plaintiff does not specify any line which could be fixed if its contention should be adopted by this Court. What would be the line? Is this Court to investigate to what extent it may hereafter become necessary for riparian owners on the east

bank of the Delaware River to use the subaqueous soil of the river Delaware and fix a line which represents such probable future use? Such a suggestion is without any basis whatever to support it. Moreover, no such suggestion was made by Plaintiff when the case was before the Special Master.

Plaintiff argues that the qualifying phrase in Article VIII "except as herein expressly set forth" refers to a cession of land. The phrase obviously refers to the "jurisdiction" over the river which was ceded to New Jersey by Article I of the Compact. Plaintiff argues that the Compact expressly legalized the grants of subaqueous soil by the State of New Jersey. This again is a strained construction of Article VII. The phrase "riparian lands" refers to the upland and perhaps to the foreshore, but not to the subaqueous soil. Compare the following cases

Hart v. Board of Levee Commissioners, 54 Fed. 559;

Bathgate v. Irvine, 58 Pac. 442, 126 Cal. 135;

Rome Railway & Light Co. v. Loeb, 141 Ga. 202; 80 S. E. 785, Ann. Cas. 1915 C. 1023.

"Riparian" lands are "bank" lands; not lands under water.

Even if the Compact of 1905 be construed as ceding to the State of New Jersey *the right to determine* to whom riparian rights (i.e., wharf rights appurtenant to riparian lands) shall be granted, it would still not affect the boundary between the States in any conceivable way. The boundary line would continue to be low water mark.

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It is safe to say that the construction of the Compact of 1905 now contended for by New Jersey did not occur to its counsel until long after the present suit was instituted.

The Bill of Complaint in this case (Rec., pp. 4-18) sets forthwith great particularity the source of Plaintiff's claim of title to the eastern half of the Delaware River and nowhere mentions the Compact of 1905 as the source of that claim. It is inconceivable that the contention now made could have been overlooked when the bill was filed if there were any basis to support it.

Moreover, the construction placed upon the Compact at all times since its execution and approval by Congress has been the reverse of that now contended for by Plaintiff. Since 1907 the United States has accepted several cessions of subaqueous soil from the State of Delaware east of the ship channel within the circle. It is safe to say that the contention made in Plaintiff's brief in this case is the first time that the idea has ever been advanced that the Compact of 1905 settled the boundary dispute within the twelve-mile circle. Certainly if it had settled the dispute by ceding to New Jersey the eastern half of the river or any part thereof there would have been no occasion whatever for the language of Article VIII of the Covenant which expressly reserves the boundary question from the settlement.

* * * *

APPENDIX 39 — REPORT OF THE SPECIAL MASTER, *NEW JERSEY v. DELAWARE*, OCTOBER TERM, 1933 (EXCERPTS: EXERCISE OF JURISDICTION OVER THE DELAWARE RIVER WITHIN THE CIRCLE, FINDINGS OF FACT, CONCLUSIONS OF LAW, RECOMMENDATIONS FOR A DECREE)

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933.

No. 11, Original

State of New Jersey,

Plaintiff,

vs.

State of Delaware,

Defendant.

Report of the Special Master.

[table of contents intentionally omitted]

[commencing at page 46]

Exercise of Jurisdiction over the Delaware River Within the Circle.

This Court has in several cases announced the rule that where one State has acquiesced in the exercise of dominion by another over a tract of land for generations, it will be regarded as a recognition of the right and can be overcome only by the clearest and most unquestioned proof.

Thus, in *Indiana v. Kentucky*, 136 U.S. 479, it appeared that for upwards of seventy years, the State of Indiana had failed to lay any claim or assert any title to the disputed territory. This Court said (p. 510):

> "This long acquiescence in the exercise by Kentucky of dominion and jurisdiction over the island is more potential than the recollections of all the witnesses produced on either side. Such acquiescence in the assertion of authority by the State of Kentucky, such omission to take any steps to assert her present claim by the State of Indiana, can only be regarded as a recognition of the right of Kentucky too plain to be overcome, except by the clearest and most unquestioned proof. It is a principle of public law universally recognized, that long acquiescence in the possession of territory and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority. In the case of Rhode Island v. Massachusetts, 4 How. 591, 639, this court, speaking of the long possession of Massachusetts, and the delays in alleging any mistake in the action of the commissioners of the colonies, said: 'Surely this, connected with the lapse of time, must remove all doubts as to the right of the respondent under the agreements of 1711 and 1718. No human transactions are unaffected by time. Its influence is seen on all things subject to change. And this is peculiarly the case in regard to matters which rest in memory, and which consequently fade with the lapse of

time and fall with the lives of individuals. For the security of rights, whether of States or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be invoked with greater justice and propriety than in a case of disputed boundary.'"

In *Massachusetts v. New York,* 271 U.S. 65, this Court said (p. 95):

> "Long acquiescence in the possession of territory and the exercise of dominion and sovereignty over it may have a controlling effect in the determination of a disputed boundary. Indiana v. Kentucky, 136 U.S. 479; Michigan v. Wisconsin, 270 U.S. 295. Even though the Treaty of Hartford provided 'that no adverse possession of the said lands for any length of time shall be adjudged a disseisin of the Commonwealth of Massachusetts,' it does not affect the interpretation by Massachusetts of her own deeds and acts, or her long continued acquiescence in that interpretation, as persuasive, if not conclusive, evidence of the correctness of the construction which we place upon the deeds themselves."

The foregoing cases show that this Court has applied this rule in cases where there has been continuous dominion asserted by one State for a very long period of time and that assertion of dominion has been acquiesced in by the other State. This principle has no application to a case where each

State has on all occasions asserted its claim and, where occasion has arisen, has litigated and supported it to the best of its ability.

The evidence shows the existence of a dispute between the States of New Jersey and Delaware over the boundary from the beginning of their statehood. It has continued for upwards of a hundred years. Moreover, the Compact of 1905 (Exhibit 53) is in itself evidence of the fact that at the time of signing the Compact the dispute still existed and remained unsettled.

The Acts of the Delaware Legislature of 1801 and 1803 recognized the records of land titles in Pennsylvania under the Penn title as constituting the source of the title of the citizens of the State. (Exhibits 671, 672.) Further resolutions to the same effect are found in the resolution of January 26, 1849 (Exhibit 682), the resolutions of 1895 (Exhibit 683), and the proceedings before the Legislature of 1909 upon the presentation of the letters patent to the State. (Exhibit 541.)

In Scharf's "History of Delaware" and Vincent's "History of Delaware," the boundaries of the State are stated to include the Delaware River within the twelve-mile circle. (Exhibits 501, 503.) In Judge Rodney's monograph upon the early relations of Delaware and Pennsylvania he refers to the grants to Penn from the Duke of York as the source of Delaware's ownership of the bed of the Delaware River within the twelve-mile circle. (Exhibit 297, p. 3.)

The State boundary acts of defendant since 1852 have expressly included within the limits of the State the entire bed of the Delaware River within the twelve-mile circle. (Exhibit 162.)

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A list of the laws relating to fisheries within the twelve-mile circle passed by the defendant is found in Exhibit 679. It was the assertion by the defendant of exclusive dominion over the river within the twelve-mile circle embodied in various fishing laws which resulted in the former suit between plaintiff and the defendant in this Court. (Exhibit 693.)

In the *Case of Pea Patch Island* (30 Fed. Cas. 1123, Fed. Cas. No. 18311), the Delaware Assembly ceded Pea Patch Island to the United States, and in the Arbitration proceeding that was subsequently tried relating to the title conveyed, witnesses appeared to testify on behalf of the United States to Acts of dominion by the State of Delaware.

A summary of the testimony before the Arbitrator is thus stated by him:

> "On the part of Delaware, the evidence is full and complete of the exercise of jurisdiction over that part of the river and islands, as far back as evidence can be expected to go. The process of her courts, and of the courts of the United States sitting in that district, for the arrest of persons and property afloat, has been issued and executed, and continues so to be, quite over to the low water mark on the Jersey side; and this, not occasionally, but habitually, without doubt or question, as a matter of course, whenever applied for. Such arrests have been made of persons and property escaping from above. The cases have been contested upon every ground that ingenuity could suggest, or the zeal of parties prompt; but there

never has been an instance of any one disputing the jurisdiction in the courts, either of the State or of the Union. This must be admitted to be very persuasive evidence. In the absence of proof to the contrary, it must be deemed conclusive.

"Now, this evidence comes from numerous witnesses, of great intelligence and unquestionable credit, well informed upon the subject they speak of, by their pursuits in life, and it coincides (for it did not require support or corroboration) with the proof of particular instances, both by parol and by exemplifications of records, here produced. The exhibition of the evidence at large, or even a considerable part of it, would be tedious and unnecessary. The whole was carefully reduced to writing, and will be preserved. But it is quite impossible to look at the list of witnesses without feeling unbounded confidence that, from their own experience, and from the traditions and other sources of information of the past, which lawyers and judges are obliged to explore, and to follow as their guide, we have the whole knowledge of what has been held and done from an early, perhaps the earliest, period, concentrated and condensed in this body of testimony. With nothing to contradict it, (and there is nothing), one might safely say, such has always been the law of Delaware. Kensey Johns, esquire, for example, above eighty-eight years of age, states 'that he has resided in Newcastle since 1780, now sixty-seven years. He was a practising

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lawyer for twelve years, afterwards chief justice of the supreme court for thirty-eight years, afterwards chancellor of the State, since that time, and at present, living a private gentleman.' Any one else, speaking of him, would add, and, during the whole of this lengthened period, exercising a most wholesome influence, by example and precept, upon the mind and morals of the community he lived in. He says 'it has always been considered and held by the courts, public officers and lawyers of Delaware, as far as my memory reaches, that the title and jurisdiction of the State of Delaware extended to a circle of twelve miles around Newcastle, to low water mark on the New Jersey shore. I have never heard the title and jurisdiction of the State of Delaware, over that part of the river Delaware, doubted by any court, public officer or lawyer in Delaware, on any occasion whatever. Within my knowledge and remembrance, writs have been often issued out of the courts of Delaware, to seize vessels and persons in all parts of the river Delaware, within the circle to low water mark on the New Jersey shore, and no dispute, question, or plea was ever made or suggested, within my memory, before any court in Delaware, against the title of Delaware over all such parts.' And, again, 'the State of Delaware, for the whole period of my remembrance, and as far back as my researches extend, has claimed and exercised jurisdiction over the Delaware river and soil thereof, within the circle, to low water mark on the Jersey shore,

and the State has never failed to exercise this jurisdiction when called upon or asked to do so.' Eleven other witnesses, eminent citizens of Delaware, with large means of knowledge, whose names, if repeated, would command respect for their testimony, make similar statements, and some of them give an account of particular cases of arrest and seizure, known to them personally. John Steele, also, a citizen of Pennsylvania, gives an account of his following a vessel down the river, getting process against her from a court in Delaware, and having it executed far over on the east side of the river." (Exhibit 676, pp. 53-56.)

In the suit in this Court in 1877 the defendant produced a number of witnesses, including United States Circuit and District Court Judges and Marshals, to show repeated instances of the exercise of jurisdiction over the entire circle by Delaware to the New Jersey shore. (Exhibit 691.)

On behalf of plaintiff there is likewise offered evidence of acts of dominion since statehood over the river within the circle. New Jersey has made two cessions of land situate within the twelve-mile circle, to the United States, the first in 1907 for the same land ceded by Delaware in the same year. (Exhibits 136-137.) In 1909 New Jersey made a cession for lighthouse purposes for which there appears no Delaware grant. (Exhibit 93.)

In 1917 the War Department applied to New Jersey for a cession of certain lands within the circle near Artificial Island, and it was ruled by the Attorney General of the State that the grant could not lawfully be made. (Exhibit 207.)

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Thereafter, in 1925 and 1927, the United States took two grants from Delaware for land near Artificial Island and one for land near Fort Mott, for which there appear no New Jersey deeds.

In 1823 the State of New Jersey passed acts relating to the boundaries of the counties bordering on the Delaware River which asserted the jurisdiction of the State over all the river to the ship channel. (Exhibits 37-40.)

The plaintiff has also adopted fishing statutes from time to time, a list of which appears in Exhibit 34.

The plaintiff, beginning with 1843, authorized the building of wharves beyond low water mark on its shore of the river within the twelve-mile circle. Five records of such legislative grants appear in Exhibits 41-44, 48, 131-135.

Many other grants of riparian rights by authorities of the plaintiff have been made beginning with 1883. These grants will he found in Exhibits 57-92, 94-97. These grants were all issued, and the improvements erected after the institution of the suit by plaintiff against defendant in 1877, and which was pending until 1905. (Exhibit 53.)

No testimony has been offered on behalf of plaintiff showing the exercise of dominion by it over shipping in the eastern half of the river through the processes of its courts.

Plaintiff has introduced some sixty-one maps of the State of Delaware. (Exhibits 1133, 1136-1138, 1140-1143, 1180.) The object of this evidence is to show that since none of

these maps carries the twelve-mile circle to the New Jersey shore, the maps are negative evidence to the effect that the boundaries of the defendant do not include the Delaware River.

Colonel Lawrence Martin testified concerning some of these maps, (Rec. 686-714) and it will appear from his testimony that on none of the maps offered by plaintiff was any attempt made to fix any boundary between plaintiff and defendant. It would seem that in a controversy involving so many aspects little weight can be given to the absence of a boundary between the States upon particular maps. One map in evidence, as Colonel Martin testified, represents a very careful effort by the map makers to plot the boundaries accurately. This is the United States Geological Survey map which shows the eastern boundary of Delaware on the New Jersey shore within the twelve-mile circle. (Exhibits 720, 724, 726.)

Maps made by the Federal Government under competent authority have been recognized by this Court as of evidential value in the matter of boundaries. *Louisiana v. Mississippi*, 202 U.S. 1, 55-56.

It is contended by plaintiff that the rule of the common law limiting the owner upon the shore to high water mark had been modified and liberalized by the New Jersey decisions and Acts of Assembly, and that this has changed the boundary within the river. But the policy of New Jersey could, of course, not change the title to the river unless this policy gave rise to the actual exercise of rights adversely the defendant.

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The claim of defendant in the case is, to low water mark on the New Jersey shore within the twelve-mile circle and defendant claims that there is nothing inconsistent between the ownership of the subaqueous soil and the exercise of riparian rights along the river front. There is no evidence in the case of any such adverse exercise of rights by riparian owners as could give rise to prescriptive rights on the part of the plaintiff. The number of grants and improvements thereunder made upon the plaintiff's shore were few, as above pointed out, and in no view of the matter could the exercise of riparian rights change the title to the river or affect the boundary between the plaintiff and the defendant.

By the Compact of 1905 (Exhibit 53) the two States agreed, among other things, each with the other as follows:

> "Art. VII. Each State may, on its own side of the river, continue to exercise riparian jurisdiction of every kind and nature, and to make grants, leases, and conveyances of riparian lands and rights under the laws of the respective States.
>
> "Art. VIII. Nothing herein contained shall affect the territorial limits, rights, or jurisdiction of either State of, in, or over the Delaware River, or the ownership of the subaqueous soil thereof, except as herein expressly set forth."

Under this Compact clearly all improvements made by riparian owners upon the shore of either State are protected, and any decree fixing the boundary between the plaintiff and the defendant must so provide.

* * *

Appendix 39

[commencing at page 72]

FINDINGS OF FACT.

1. The territory now comprised within the State of Delaware was originally settled in the seventeenth century by the Dutch and Swedes, the first settlement having been made at Swaanendael by the Dutch near the present town of Lewes, Sussex County, Delaware, in 1631. Subsequent settlements were made by the Dutch and Swedes within said territory prior to 1664.

2. In 1664 the territory now comprised within the State of Delaware, and the settlements then existing and then under the Government of the Dutch, were conquered by the Crown of England. From 1664 until August 24, 1682 (with the exception of a brief period from July, 1673, to February 9, 1674) the said territory and said settlements were administered and governed in all respects as a dependency of the Government and Colony of New York, the proprietary of the New York Colony being during all of said period his Royal Highness James, Duke of York and Albany, the heir presumptive to the Crown of England.

3. The Duke of York, though without record title by letters patent from the Crown for the said territory or for the said powers of government over said territory, had a *de facto* title to and was the *de facto* proprietary of said territory and settlements from the date of the English Conquest in 1664 until the date of his grants to William Penn on August 24, 1682.

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4. On August 24, 1682, the Duke of York granted and conveyed to William Penn by deed of feoffment and also by lease for ten thousand years, the following lands and waters:

> "All That the Town of Newcastle otherwise called Delaware And all that Tract of Land lying within the Compasse or Circle of Twelve miles about the same scituate lying & being upon Ye River Delaware in America And all Islands in the said River Delaware and the said River and soil thereof lying North of the Southermost part of the said Circle of Twelve Miles about the said Town."

The said deed of feoffment contained a covenant on the part of the said Duke of York for further assurance of the title thereby conveyed at any time within seven years from the date thereof.

5. On October 28, 1682, formal livery of seisin and delivery of possession of the lands and waters above described in said deed of feoffment was duly made to William Penn by duly authorized attorneys on behalf of the Duke of York, and on the same day the inhabitants of New Castle duly submitted to the government of William Penn. On November 21, 1682, the Government of the Colony of New York, through its duly authorized officers, approved and authorized the transfer to William Penn of the said lands and waters by the Duke of York, and enjoined all magistrates and officers within the limits of the lands thus conveyed to submit to the government of William Penn and yield him obedience.

6. On August 24, 1682, by deed of feoffment and also by lease for ten thousand years, the Duke of York conveyed to William Penn a tract of land beginning twelve miles south of New Castle, Delaware, and extending southerly to Cape Henlopen. Said deed of feoffment contained a covenant on the part of the said Duke of York for the further assurance of the title thereby conveyed at any time within seven years from the date thereof. On November 7, 1682, livery of seisin and delivery of possession of said lands last referred to was duly made to William Penn by said duly authorized attorneys on behalf of the Duke of York.

7. Immediately following the formal livery of seisin and delivery of possession to William Penn of the lands described in said two deeds of feoffment and two leases above referred to, William Penn organized and established a government for the three counties comprising the Delaware territory. On December 7, 1682, by Act of a joint assembly consisting of representatives from the Pennsylvania Counties and from the Delaware Counties, the three Delaware Counties were annexed to the Province of Pennsylvania.

8. From 1682 until 1701, the three counties of Delaware and the Province of Pennsylvania were governed by a joint legislative assembly. Thereafter, and until the American Revolution, the Colony of Delaware had its own separate legislature, but until the revolution continued to acknowledge William Penn and his successors as proprietaries and governors of Delaware.

9. From 1682 until the American Revolution, William Penn and his successors as proprietaries and governors, and

the respective legislative assemblies above referred to, possessed and enjoyed the lands and waters within the boundaries of the Colony of Delaware as fixed by said deeds of feoffment and leases and exercised full and exclusive control and dominion thereover.

10. On March 22, 1682/3, by Letters Patent under the Great Seal of England, Charles II of England granted to his said brother, the Duke of York, the said lands and waters described in the said two deeds of feoffment and in the said two leases above referred to, which said Letters Patent conveyed said lands and waters in the following language:

> "All that the Towne of Newcastle otherwise called Delaware and the fort therein or thereunto belonging scituate lying and being between Maryland and New Jersey in America And all that Tract of land lying within the Compasse or Circle of twelve miles about the said Towne Scituate lying and being upon the River of Delaware and all Islands in the said River of Delaware and the said River and Soyle thereof lying North of the Southermost part of the said Circle of twelve miles about the said Towne And all that Tract of Land upon Delaware River and Bay beginning twelve miles South from the said Towne of Newcastle otherwise called Delaware and extending South to Cape Lopen."

11. Said grant of March 22, 1682/3, was so made at the request and at the expense of William Penn, for the benefit of William Penn and delivered to William Penn, in fulfillment

of the covenants for further assurance contained in said deeds of feoffment of August 24, 1682.

12. Said Letters Patent of March 22, 1682/3, were never thereafter surrendered, nor was the grant of lands and waters thereby made ever abandoned nor was its validity ever impaired by any act or proceeding.

13. The original of Exhibit 529 in this cause, being a certain document in the State archives of the State of Delaware, at Dover, is in fact the original Letters Patent of March 22, 1682/3, and the seal thereto attached is the Great Seal of England.

14. Prior to the Treaty of Peace between the United States of America and the Kingdom of Great Britain of September 2, 1783, the Province or State of New Jersey at no time any title to any subaqueous soil of the Delaware River or Bay west of low water mark on the western shore of said Province or State of New Jersey.

15. By Orders in Council of November 13, 1685, and June 23, 1709, the claim of Lord Baltimore to the territory comprised within the three counties of Delaware was finally denied and said orders were never modified or reversed.

16. The said Order in Council of November 13, 1685, and the proceedings incident thereto recognized William Penn as the equitable owner of the Colony of Delaware.

17. By Order in Council of August 9, 1694, and by Letters Patent under the Great Seal of England of August 20,

1694, the title and possession of William Penn to the soil of the Colony of Delaware and the powers of government of William Penn thereover were duly and formally recognized, ratified and confirmed by the Crown of England.

18. By various and sundry acts of the Crown of England, its ministers and officers, from the year 1682 until the year 1776, the title and possession of William Penn to the soil of the Colony of Delaware, and the powers of government of the said William Penn, or his successors, and of the Delaware Assembly thereover were recognized and confirmed.

19. Neither the Crown of England nor its ministers or officers, at any time from the year 1682 until the year 1776, took or instituted any action or proceeding looking to the dispossession of William Penn and his successors from the administration of the government, or from the occupancy and possession of the soil of the Colony of Delaware. By reason thereof, the title of the said William Penn and his successors thereto and their powers of government thereover were ratified and confirmed by the Crown of England.

20. The State of Delaware at all times since 1783 has claimed, asserted and exercised exclusive dominion and jurisdiction over the lands and waters within the boundaries fixed by the said title deeds, as modified by the compact of 1905 between the States of Delaware and New Jersey. These boundaries include within their limits all that part of the Delaware River lying north of the southernmost part of a circle of twelve-miles radius from the Town of New Castle, Delaware.

21. At no time has the State of Delaware ever abandoned its claim, dominion or jurisdiction over the Delaware River within said twelve-mile circle, nor has it at any time acquiesced in the claim of the State of New Jersey, thereto, except as modified by the said Compact of 1905.

22. The State of New Jersey has at all times recognized the existence of a boundary dispute between the State of New Jersey and the State of Delaware, and by the Compact of 1905 between the said States the existence of such a dispute was expressly recognized.

23. By the Compact of 1905 between the States of New Jersey and Delaware the State of Delaware recognized the rights of riparian owners to wharf out on the easterly side of the Delaware River within the twelve-mile circle. By said Compact the State of Delaware did not convey to the State of New Jersey title to any part of the Delaware River or to any part of the subaqueous soil thereof, and said Compact did not in anywise alter or affect the boundaries of the respective states.

24. The record establishes that as early as Fisher's Chart of Delaware Bay (1756) there has been a well-defined channel of navigation up and down the Bay and River. This channel has, since the Revolution, been regularly marked by the government.

25. That Delaware River and Bay, on account of shoals, are not equally navigable in all directions, but the main ship channel must be adhered to for safety in navigation.

26. The testimony shows that the Bay is only an expansion of the lower part of the Delaware River; that the current in the Bay is mainly tidal; but the testimony shows that there is a flow of water through the Bay and that a maximum current velocity is found in the ship channel.

27. Approximately two billion cubic feet of fresh water per day drains into the Bay. It does not spread out uniformly. Observations have proved that it tends to concentrate along the Delaware shore of the Bay. By dividing the channel between the capes into three nearly equal parts observations show that about five times as much fresh water comes down the southerly channel as does the northern channel along the New Jersey shore.

CONCLUSIONS OF LAW.

1. By virtue of the issuance of the Letters Patent of March 22, 1682/3, a good title by estoppel in law passed to William Penn for the lands described in said Letters Patent, including the subaqueous soil of the Delaware River within the twelve-mile circle.

2. By virtue of the issuance of the Letters Patent of March 22, 1682/3, a good title by estoppel in equity passed to William Penn for the lands described in said Letters Patent, including the subaqueous soil of the Delaware River within the twelve-mile circle.

3. By virtue of the long uninterrupted and undisturbed possession by William Penn and his successors of the lands and waters comprised within the metes and bounds, fixed in

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the title deeds for the Colony of Delaware, William Penn and his successors acquired a good and valid title against the Crown of England to the lands and waters within said metes and bounds.

4. Said Letters Patent of March 22, 1682/3, were valid and effectual in fact and in law to convey the subaqueous soil of the Delaware River within said twelve-mile circle.

5. By the decision and decree of the Lord Chancellor of England in the case of *Penn v. Lord Baltimore*, decided by the Court of Chancery of England in 1750, the title of the successors of William Penn in and to the lands and waters comprised within the metes and bounds of the Colony of Delaware as fixed by its title deeds was adjudicated to be a good equitable title. By the decision and award of John Sergeant, Esq., arbitrator in the *Case of Pea Patch Island*, the title of the State of Delaware to the subaqueous soil of the Delaware River within said twelve-mile circle was adjudicated to be good and valid in law and in equity.

6. The preamble contained in the Act of the Delaware Legislature of February 7, 1794, does not in law constitute an estoppel or election binding upon the State of Delaware with respect to the source of the title of the State of Delaware to any of the lands or waters comprised within the metes and bounds of the State of Delaware.

7. The State of Delaware, upon acquisition of statehood on September 2, 1783, succeeded to the title of William Penn, and to the title of the Crown of England, if any, to the lands and waters comprised within the metes and bounds fixed by the said title deeds above described.

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8. The boundaries of the colony of Delaware were fixed and determined by the Letters Patent of March 22, 1682/3, from Charles II of England to the Duke of York, and by virtue of the Treaty of Paris of September 2, 1783, the State of Delaware succeeded to dominion over the soil and waters within said boundaries.

9. The said Letters Patent of March 22, 1682/3, were not in fact or in law surrendered to the Crown, either by virtue of the bill of April 11, 1683, or by virtue of any other act or proceeding whatever.

10. The record shows the existence of a well-defined deep water sailing channel in Delaware River and Bay constituting a necessary track of navigation, and the boundary between the States of Delaware and New Jersey in said bay is the middle of said channel.

RECOMMENDATIONS FOR A DECREE.

I recommend the following decree:

1. That within the twelve-mile circle the river and the subaqueous soil thereof shall be adjudged to belong to the State of Delaware, subject to the Compact of 1905.

2. That the true boundary between the plaintiff and the defendant below the twelve-mile circle shall be adjudged to be the middle of the main ship channel in said river and bay.

It is further recommended that the costs of this suit be equally divided between the two States.

WILLIAM L. RAWLS,
Special Master.

APPENDIX 40 — STATE OF NEW JERSEY ASSEMBLY BILL NO. A4287, INTRODUCED JUNE 27, 2005

ASSEMBLY, No. 4287

STATE OF NEW JERSEY

211th LEGISLATURE

INTRODUCED June 27, 2005

Sponsored by:

Assemblyman JOHN J. BURZICHELLI

District 3 (Salem, Cumberland and Gloucester)

Assemblyman DOUGLAS H. FISHER

District 3 (Salem, Cumberland and Gloucester)

Assemblyman JEFF VAN DREW

District 1 (Cape May, Atlantic and Cumberland)

Assemblyman NEIL M. COHEN

District 2 (Union)

Co-Sponsored by:

Assemblyman Caraballo, Assemblywoman Quigley, Assemblymen Stack, Morgan, Chiapone, Eagler, R. Smith, Conaway, Scalera, Conners, Green, Assemblywoman Oliver, Assemblymen Chivukula, Gibson, Prieto, McKeon, Stanley, Assemblywoman Stender, Assemblymen Payne, Cryan, Wisniewski, Steele, Gordon, Assemblywoman Voss, Assemblyman Johnson, Assemblywoman Weinberg, and Assemblyman Vas

Appendix 40

SYNOPSIS

Prohibits investment of certain public funds in financial institutions located in Delaware if that state does not amend its permitting laws to conform to the Compact of 1905.

CURRENT VERSION OF TEXT

As introduced.

A4287 BURZICHELLI, FISHER

AN ACT setting conditions on the investment of certain public funds in financial institutions located in another state and supplementing Title 52 of the Revised Statutes.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. Notwithstanding any provision of law to the contrary, no assets of any pension or annuity fund under the jurisdiction and control of the Division of Investment in the Department of the Treasury, or its successor, shall be invested in any bank or financial institution which is incorporated, headquartered or chartered in the State of Delaware unless Delaware, within 180 days of the effective date of this act, takes final and binding legislative or executive action to amend its laws to ensure that Delaware does not apply its state regulatory authority to the construction of riparian improvements appurtenant to the New Jersey shore of the Delaware River.

2. The State Investment Council and the Director of the Division of Investment shall take appropriate action to sell, redeem, divest or withdraw any investment held in violation of the provisions of this act. This act shall not be construed to require the premature or otherwise imprudent sale, redemption, divestment or withdrawal of an investment, but such sale, redemption, divestment or withdrawal shall be completed not later than one year following the effective date of this act.

3. Within 60 days after the effective date of this act, the Director of the Division of Investment shall submit to the President of the Senate and the Speaker of the General Assembly a report of all investments held as of the effective date of this act which are in violation of the provisions of this act. Every year thereafter, the director shall report on all investments sold, redeemed, divested or withdrawn in compliance with this act.

Each report after the initial report shall provide: a description of the progress which the division has made since the previous report and since the enactment of this act in implementing the provisions of section 1 of this act.

4. This act shall take effective immediately.

STATEMENT

This act requires the Division of Investment in the Department of the Treasury to divest State-administered pension fund investments from banks and financial institutions that administer credit instruments in the State of

Delaware if that state does not take legal steps to amend its laws to ensure that Delaware does not apply its state regulatory authority to the construction of riparian improvements appurtenant to the New Jersey shore of the Delaware River. Article VII of the Compact of 1905 gives the State of New Jersey exclusive riparian jurisdiction over improvements appurtenant to the New Jersey shore of the Delaware River. In early February, 2005, the Secretary of the Delaware Department of Natural Resources and Environmental Control exercised power under the state's Coastal Zone Act, 7 Del. Code § 7001, et seq., effectively to block the construction of a proposed $500 million natural gas terminal located in Logan Township, New Jersey. A natural gas company announced plans in 2003 to build the terminal, which would handle three tankers a week and import enough liquefied natural gas to serve five million homes.

A pier at that terminal would extend several hundred yards beyond the low water mark, across the boundary line established by the U.S. Supreme Court in 1934, subject to the Compact of 1905, in order to allow tankers to dock and unload their cargo. The proposed facility would not only provide badly needed natural gas to citizens of New Jersey but bring significant economic benefits to southern New Jersey by way of jobs and economic development. The administrative ruling in Delaware was issued under a Delaware law that was intended to protect Delaware's coastline, but which effectively restricts industrial development and significantly chills other development on the New Jersey shoreline within the twelve-mile circle of New Castle, Delaware.

Appendix 40

Article VII of the Compact of 1905 provides: "Each State may, on its own side of the river, continue to exercise riparian jurisdiction of every kind and nature, and to make grants, leases, and conveyances of riparian lands and rights under the laws of the respective States." The Compact was ratified by Congress in 1907 and is binding on the State of Delaware. Act of Jan. 24, 1907, ch. 394, 34 Stat. 398 (1907).

Delaware has not only invoked its state permitting laws to block the LNG project mentioned above, but it has recently attempted to apply its permitting laws to other economic development projects on the New Jersey shoreline. Delaware's putative control over such projects has retarded, and will continue to chill, economic development along the New Jersey shoreline opposite Delaware.

This bill delays the proposed New Jersey divestiture for 180 days after enactment of the bill. This delay provides Delaware an opportunity to reconsider the extension of its misapplied authority to the New Jersey side of the river. Delaware is requested to amend it laws to ensure that Delaware does not apply its state regulatory authority to the construction of riparian improvements appurtenant to the New Jersey shore of the Delaware River.

APPENDIX 41 — DELAWARE HOUSE OF REPRESENTATIVES, BILL NO. 296 (INTRODUCED JUNE 29, 2005)

SPONSOR: Rep. Smith & Sen. McDowell

HOUSE OF REPRESENTATIVES

143rd GENERAL ASSEMBLY

HOUSE BILL NO. 296

AN ACT TO AMEND THE LAWS OF DELAWARE RELATING TO THE PRESERVATION OF THE TERRITORIAL INTEGRITY OF DELAWARE AND THE MARKING OF OUR NORTHEASTERN BOUNDARY.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1. The Governor of the State of Delaware is authorized to call upon the Delaware National Guard to protect the territorial integrity of the State of Delaware and to block and/or remove any encroachments upon our boundary. The Governor of the State of Delaware is authorized to call upon the Delaware National Guard to defend the sovereign rights of the State of Delaware.

Appendix 41

Section 2. The Governor shall cause boundary markers to be placed on the eastern boundary of the state of Delaware to mark the boundary from the northernmost point between the states of New Jersey and Delaware to the point at which the boundary abandons the low-water mark of the Delaware River and relocates itself to a point in the middle of the Delaware River. For areas which are wetted by the waters of the Delaware River, boundary markers shall be set approximately one-half mile apart and shall be of such a nature as to be visible from the adjacent boundary marker. For areas which are considered land, including but not limited to "Artificial Island" and "Killcohook National Wildlife Refuge", the boundary markers shall be placed approximately one-quarter mile apart and shall be of such a nature as to be visible from adjacent boundary markers. The boundary markers shall clearly indicate that they mark the boundary of the State of Delaware through the display of words, abbreviations, the State Seal, or other similar and appropriate markings.

Section 3. The area now lying within the Sovereign State of Delaware sometimes referred to as the "Killcohook National Wildlife Refuge" shall be named and henceforth forever known as the "Major Robert Kirkwood Tract."

The area now lying within the Sovereign State of Delaware sometimes referred to as "Artificial Island" shall be named and henceforth forever known as the "Mary Vining Tract."

Section 4. Implementation of Section 2 of this Act is subject to appropriation.

Appendix 41

SYNOPSIS

This Act authorizes the Governor to call out the National Guard of the State of Delaware to defend against encroachments upon the territory of the State of Delaware.

The State of New Jersey, having difficulty in some quarters accepting the authenticated boundary of our two states, can benefit from the clear marking of the eastern boundary of the State of Delaware. This Act will accomplish that goal by authorizing the Governor to establish visible boundary markers between the two states so local and state officials in New Jersey will understand where the boundary lays.

This Act further names two parcels of land in the State of Delaware which lay east of the Delaware River after notable Delawareans. Robert Kirkwood was a renowned Revolutionary War commander of Delaware soldiers who helped American forces prevail at the Battle of Cowpens. Mary Vining was a confidant of Caesar Rodney and was nicknamed the "Belle of the Revolution." She maintained the Ridgely House on The Green in Dover.

APPENDIX 42 — PROPOSED SUPPLEMENTAL DECREE, *STATE OF NEW JERSEY v. STATE OF DELAWARE*, ORIGINAL NO. 11

No. 11, Original

In The
Supreme Court of the United States

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF DELAWARE,

Defendant.

NEW JERSEY'S PROPOSED SUPPLEMENTAL DECREE

The Court having rendered its decision on February 5, 1934, determining the boundary between the State of New Jersey and the State of Delaware in the Delaware River within the Twelve-Mile Circle of New Castle, Delaware, to be at the low-water mark on the easterly or New Jersey side of the River, "subject to the Compact of 1905" (291 U.S. 361, 385); the Court having rendered its Decree on June 3, 1935, fixing the boundary line within the Twelve-Mile Circle on the New Jersey side at the mean-low water line, but providing that the "decree is made without prejudice to the rights of either state, or the rights of those claiming under either of said states, by virtue of the compact of 1905 between said states"

(295 U.S. 694, 699); the Court having received briefs and heard oral argument on New Jersey's motion for a supplemental decree; and the Court having issued its Opinion on all issues announced, *ante*, p. ____,

It is hereby ORDERED, ADJUDGED AND DECREED as follows:

1. Article VII of the Compact of 1905 between the State of New Jersey and the State of Delaware grants New Jersey riparian jurisdiction to regulate the construction of improvements appurtenant to the New Jersey shore of the Delaware River within the Twelve-Mile Circle, free of regulation by Delaware.

2. The State of Delaware is enjoined from requiring permits for the construction of any improvement appurtenant to the New Jersey shore of the Delaware River within the Twelve-Mile Circle. The State of Delaware is further enjoined from enforcing any conditions attached to any such permits.

3. Except as otherwise provided herein, the Decree of June 3, 1935 shall remain in full force and effect.